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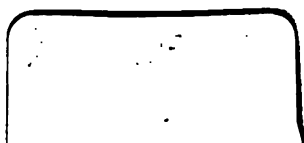
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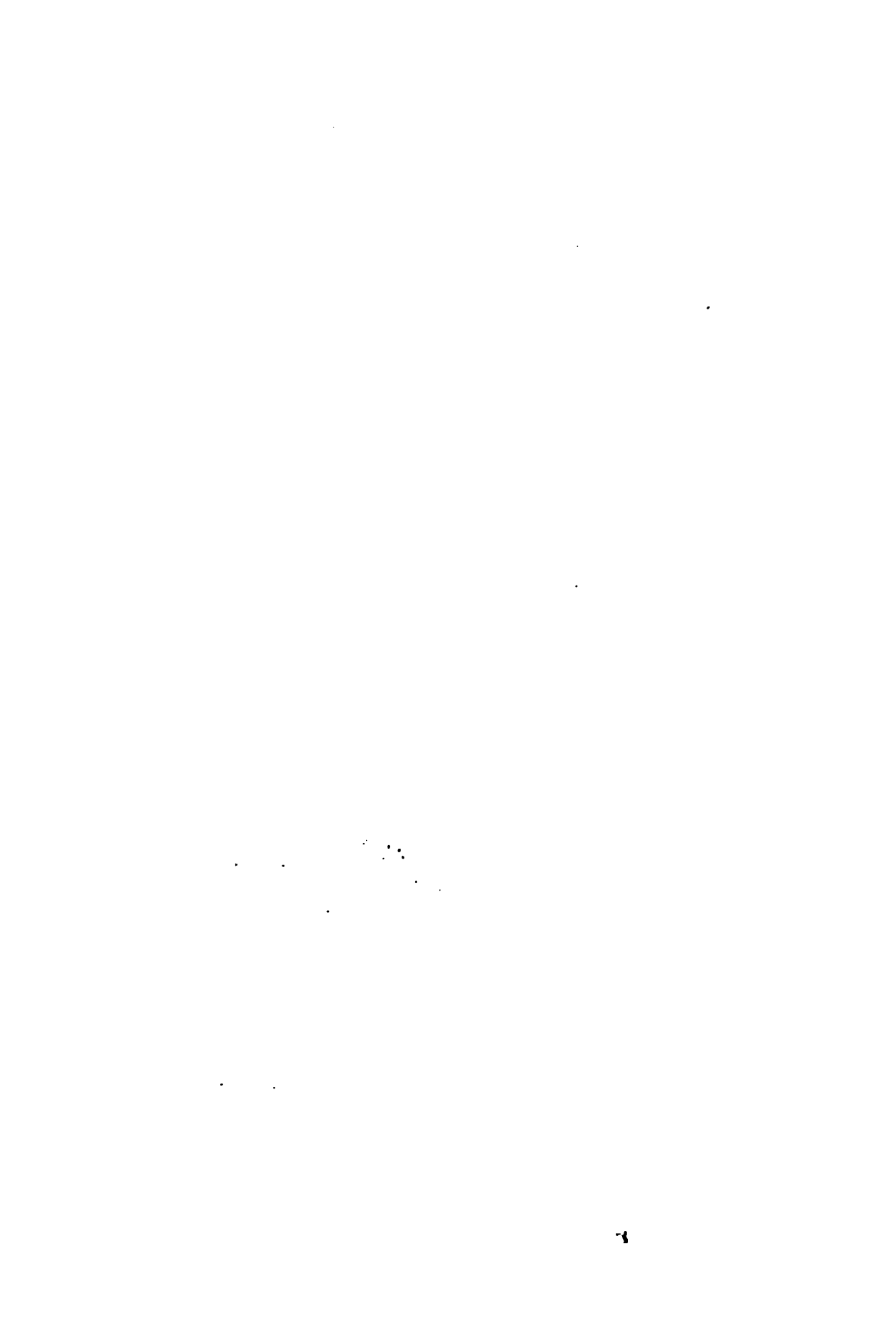
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Barlow



CASES  
IN  
BANKRUPTCY;

BY GEORGE ROSE, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

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VOL. II.

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CONTAINING

**Reports of Cases**

DECIDED BY

LORD CHANCELLOR ELDON,

FROM MICHAELMAS TERM, 1813,

TO

THE SITTINGS AFTER TRINITY TERM, 1816, INCLUSIVE,

AND

**CONTEMPORANEOUS CASES**

IN OTHER COURTS.

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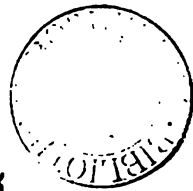
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1821.



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# TABLE

**OF**

## THE CASES.

A.		Page			Page
ADAM, <i>Ex parte</i> .—In			<i>parte</i> .—In the Matter		
the Matter of Cook	-	36	of Stein and Others		197
Alderson, <i>Ex parte</i>	-	446	Barrow, <i>Ex parte</i> .—In		
Allanson v. Atkinson	-	134	the Matter of Hythe		252
Andrews, <i>Ex parte</i> .—In			Bartlet v. Tuchin	-	435
the Matter of Emmett		410	Bayley v. Schofield	-	100
Anon. <i>Ex parte</i> .—In the			Baxter v. Nichols	-	112
Matter of Lee and			Beal, <i>Ex parte</i>	-	140
Armstrong	-	54 N.	Beauchamp v. Tomkins		108
Assignees of Jamieson v.			Bell, <i>Ex parte</i> .—In the		
Hodson	-	467	Matter of Scott	-	136
			Benson, <i>Ex parte</i>	-	75
			Berks v. Wigan	-	108 N.
B.			Bigg, <i>Ex parte</i> .—In the		
Back v. Gooch	-	467	Matter of Harrison		37
Baker, <i>Ex parte</i>	-	440	Binmer, <i>Ex parte</i>	-	453
Baker v. Langhorn	-	471	Birkett, <i>Ex parte</i> .—In the		
Baldwin.—In the Matter			Matter of Reynolds		71
of —	-	20	Blagden, <i>Ex parte</i> .—In		
Bank of England, <i>Ex</i>			the Matter of Hearn		249
<i>parte</i> .—In the Matter			Bland, <i>Ex parte</i> .—In the		
* of Greaves	-	82	Matter of Strickland		91
Bank of Scotland, <i>Ex</i>					
VOL. II.					

# TABLE OF REPORTED CASES.

	Page		Page
Bluck v. Thorn and An-		Carr, <i>Ex parte</i> - -	260
other - - -	285	Carstairs v. Stein - -	178
Bolton, <i>Ex parte</i> .—In		Cassidy, <i>Ex parte</i> .—In	
the Matter of Mac-		the Matter of Cassidy	217
kenzie - - -	389	Cartwright, <i>Ex parte</i> .—	
Bonsor, <i>Ex parte</i> .—In the		In the Matter of White-	
Matter of Lloyd - -	61	house - - -	230
Bovill v. Wood - -	23	Cawthorne, <i>Ex parte</i> .—	
Bowness, <i>Ex parte</i> .—In		In the Matter of Grea-	
the Matter of Phillips	266	torex - - -	186
Brickwood v. Miller	216, 340	Cheere and Others, Doc	
Brook, <i>Ex parte</i> .—In the		on the Demise of, v.	
Matter of Watson -	334	Smith - - -	280
Brind v. Bacon - -	130	Chenoweth v. Haley -	137
Brown, <i>Ex parte</i> . 113 N.		Clunes, <i>Ex parte</i> - -	451
Brown's Case - -	400	Cockayne and Others, <i>Ex</i>	
Brown v. Forrestall -	469	<i>parte</i> .—In the Matter of	
Bryant, <i>Ex parte</i> - -	1	Cliffe - - -	233
Bryant v. Withers - -	8	Cohen, <i>Ex parte</i> - -	442
Bryant.—In the Matter		Coldwell v. Gregory -	149
of — - -	17	Coles v. Barrow and An-	
Bryant, <i>Ex parte</i> .—In the		other, Assignees of	
Matter of Cumming	237	Coles - - -	277
Burn, <i>Ex parte</i> .—In the		Coles v. Wright - -	111
Matter of Moulson -	55	Cooke v. Marsh - -	440
Burt, <i>Ex parte</i> - -	446	Coombs's Case - -	396
Burton Bank, <i>Ex parte</i>	163	Corsbie v. Oliver - -	461
Busk v. Walsh - -	114	Coverly v. Morley - -	119
Buss v. Gilbert - -	157	Coulbourn, <i>Ex parte</i> .—	
Butt v. Bilke - -	171	In the Matter of Cop-	
Buxton v. Lawton -	179	land - - -	187
		Cridland, Caleb, <i>Ex parte</i>	
		—In the Matter of	
		Caleb Cridland and	
		Benjamin Cridland -	164
		Crowder,	
C.			
Campbell, <i>Ex parte</i> .—In			
the matter of Bromer	51		

# TABLE OF REPORTED CASES.

	Page		Page
Crowder, in the Matter of Watkins -	324	Garbutt, <i>Ex parte</i> -	78
Crump v. Taylor -	149	Gardner, <i>Ex parte</i> -	108
Cumming v. Roebuck -	468	Garland, in the Matter of Venables -	361
Cundy, <i>Ex parte</i> -	357	Gaskell v. Lindsay -	469
Cuthbert, <i>Ex parte</i> -	451	General Order -	477
D.		Gibbs, <i>Ex parte</i> -	38
Deey, <i>Ex parte</i> -	148	Gimingham v. Laing -	472
De Tastet v. Carroll -	461	Gladstone v. Hadwen -	131
Dewdney, <i>Ex parte</i> -	59	Glassford v. Jaffrey -	117 N.
Doe v. Anderson -	475	Glossop, <i>Ex parte</i> .—In the Matter of Kemp -	386
Doe v. Bevan -	455	Godsal v. Boldero -	411 N.
Dowden v. Fowler -	283	Goldschmidt v. Lyon -	157
Dunman, <i>Ex parte</i> -	66	Gooldie, in the Matter of Goldie, <i>Ex parte</i> .—In the Matter of Goldie -	330
Dyster, <i>Ex parte</i> .—In the Matter of Moline -	256, 349	Graham, <i>Ex parte</i> -	343
E.		Grant v. Mills -	74
Ellis v. Shirley -	143	Griffiths, <i>Ex parte</i> -	81 N.
Emery, <i>Ex parte</i> .—In the Matter of Emery -	235		342
Emmett, <i>Ex parte</i> -	452	H.	
Esdaile and Others, Doe on the Demise of, v. Mitchell and Another -	265	Halkett, <i>Ex parte</i> .—In the Matter of Mavor -	194, 229
Everett, <i>Ex parte</i> -	113 N.		
F.		Hallet v. Mears -	346 N.
Fidgeon v. Sharpe -	153	Harford, <i>Ex parte</i> -	163
Flood v. Finlay -	147	Harcourt, <i>Ex parte</i> -	203
Fry v. Malcolm -	129	Harrison, <i>Ex parte</i> -	67
G.		Harrison, <i>Ex parte</i> .—In the Matter of Nicholson -	76
Gallimore, <i>Ex parte</i> -	234	Harrison's Case -	261
Gallimore, <i>Ex parte</i> .—In the Matter of Gallimore -	234	Hartop v. Jukes -	263
		Harvey v. Liddiard -	462
		Hawkins v. Ramsbottom -	151
		Heath,	



# TABLE OF REPORTED CASES.

	Page		Page
Heath, <i>Ex parte</i> -	141	Jackson, <i>Ex parte</i> .—In	
Heath and Others v. Hall		the Matter of Jackson	221
and Porter -	271	Jarrett v. Leonard -	262
Henderson, <i>Ex parte</i> .—		Jennings, <i>Ex parte</i> -	453
In the Matter of Whes-		Imeson, <i>Ex parte</i> .—In the	
ton - - -	190	Matter of Seaton -	225
Henry v. Leigh -	144	Irvine, <i>Ex parte</i> -	450
Henson, <i>Ex parte</i> .—In			
the Matter of Watson	452	K.	
Herbert, <i>Ex parte</i> .—In		Kemp, <i>Ex parte</i> -	5 N.
the Matter of Hookham	248	Kendall, <i>Ex parte</i> -	115
Hewes v. Mott -	454	Kensington, <i>Ex parte</i>	138
Heywood, in the Matter		Kensington v. Chandler -	155
of Holmes - - -	355	Kieran v. Johnson -	462
Hiams, <i>Ex parte</i> -	437	Knight, in the Matter of	
Hill, <i>Ex parte</i> -	448	Stevens - - -	319
Hoare v. Coryton -	158		
Hodgkinson, <i>Ex parte</i> .—		L.	
In the Matter of Hodg-		Langdale, <i>Ex parte</i> -	443
kinson and Lee	172	Lewis, <i>Ex parte</i> -	59
Holmes, <i>Ex parte</i> -	95	Liddell, <i>Ex parte</i> .—In	
Holroyd v. Whitehead -	145	the Matter of De	
Hooper, in the Matter of		Prado - - -	34
Hopkins - - -	328	Lingard v. Bromley -	118
Howard v. Ramsbottom	107	List, <i>Ex parte</i> .—In the	
Howell v. Colledge -	130	Matter of Cumming	24
Hughes v. Keary -	81 N.	Loaring, <i>Ex parte</i> .—In	
Hunter, <i>Ex parte</i> .—In		the Matter of Wright	79
the Matter of Payton	382	Lord, <i>Ex parte</i> .—In the	
Hunter, <i>Ex parte</i> .—In		Matter of Stevens -	421
the Matter of Becher	363	Lowndes v. Taylor	365, 438
		Loyd v. Stretton -	460
I.			
Jackson, <i>Ex parte</i> .—In		M.	
the Matter of Heath		M'Gae, <i>Ex parte</i> .—In the	
and Stevens - - -	188	Matter of Wood -	376
		M'Williams	

# TABLE OF REPORTED CASES.

	Page		Page
M <sup>c</sup> Williams. — In the		N.	
Matter of ———	197	Newton, <i>Ex parte</i>	- 19
M <sup>c</sup> Williams, in the Matter		Northam, <i>Ex parte</i>	- 140
of Graham	- 453	Northwood, <i>Ex parte</i> .	
Malkin, <i>Ex parte</i> . — In the		— In the Matter of Ri-	
Matter of Adams	- 27	chards	- 246
Marsh and Others. <i>Ex</i>		Nowlan's Case, the Record	
<i>parte</i> . — In the Matter		in	- 400
of Carlill	- 239	O.	
Martin, <i>Ex parte</i> . — In the		O'Brien v. Grierson	- 454
Matter of Fowler	- 87	Ogilby, <i>Ex parte</i> . — In the	
Martin v. Bucknell	- 156	Matter of Wilson	- 177
Martin, <i>Ex parte</i> . — In the		Oliver v. Smith	- 122
Matter of Martin	- 331	Oughterlony and Others,	
Masterman, <i>Ex parte</i>	- 442	Assignees of Gairdners,	
Matthews, <i>Ex parte</i>	- 260	Bankrupts, v. Easterby	
Mawson, Doe on the De-		and Others	- 272
mise of, v. Liston	- 276	Overton, <i>Ex parte</i> . — In	
Mead v. Braham	- 289	the Matter of Rushton	257
Meyer v. Sharp	- 124	P.	
Miles, <i>Ex parte</i> . — In the		Pachelor, <i>Ex parte</i>	- 26
Matter of Rees	- 68	Parker v. Smith	- 120
Mills, Assignees of E.		Peake, <i>Ex parte</i> . — In the	
Chambers, H. C. Gran-		Matter of Warburton	54
ger, and R. Chambers,		Peake, <i>Ex parte</i> . — In the	
junr. v. Bennett	- 269	Matter of Lightoller	- 454
Minett v. Forrester	- 158	Peyron, <i>Ex parte</i> . — In the	
Moody, <i>Ex parte</i> . — In		Matter of Ramsay	- 366
the Matter of Preston,		Poole v. Lukin	- 476
in the Matter of Warne	413	Powell, <i>Ex parte</i>	- 449
Moore v. Wright	- 470	Practice	- 161, 323
Moravia and Another, v.		Preston, <i>Ex parte</i>	- 21
D. Hunter, I. W. Glass	264	Price's Case	- 260
Muller v. Ross	- 99	Price	

# TABLE OF REPORTED CASES.

	Page		Page
Price v. Nixon -	437	a Bankrupt, v. Leigh	
Prosser, <i>Ex parte</i> .—In the		and Another -	286
Matter of Brown -	370	Sarratt v. Austin -	112
R.		Schofield, <i>Ex parte</i> .—In	
Read, <i>Ex parte</i> .—In the		the Matter of Laidlow	246
Matter of Bland -	84	Scott v. Ambrose -	434
Read v. Cooper -	127	Selkrig v. Davies	97, 291
Read v. Sowerby -	288	Sharpe and Others, As-	
Record in Nowlan's Case -	401	signees, &c. v. Rhoades	192
Reed v. James -	464	Sherwood, Gent. one, &c.	
Richmond v. Heapy -	474	v. Benson -	276
Rimmer v. Green -	23 N.	Shew v. Thompson -	468
Roberts v. Hardy	174, 456	Shiles, <i>Ex parte</i> .—In the	
Roberts, <i>Ex parte</i> .—In		Matter of Shiles -	381
the Matter of Wanga-		Shirley, <i>Ex parte</i> .—In	
man -	378	the Matter of Braham	71
Robson v. ——— -	50	Simpson, <i>Ex parte</i> .—In	
Rodbud, <i>Ex parte</i> .—In		the Matter of Ashton	337
the Matter of Titley -	83	Skerratt, <i>Ex parte</i> .—In	
Roffey, <i>Ex parte</i> .—In the		the Matter of Hewitt	384
Matter of Dewdney -	245	Slaughter v. Cheyne -	110
Roscoe, <i>Ex parte</i> .—In		Smith, <i>Ex parte</i> .—In the	
the Matter of Sergen-		Matter of Jackson -	25
fry -	345	Smith, <i>Ex parte</i> .—In the	
Rowe, in the Matter of		Matter of Harvey -	63
Thomas -	339	Staniforth v. Fellows -	151
Rowlatt, <i>Ex parte</i> .—In the		Stevens v. Jackson and	
Matter of Rowlatt -	416	Another -	284
Rumsey v. George -	109	Stewart, <i>Ex parte</i> .—In	
Russell v. Sharp -	115	the Matter of Bryant	6
Rutledge, in the Matter		Stewart v. Hall -	94 N.
of -	369	Stockfleth v. De Tastett	
S.		and Others -	282
Sadler, Assignee of Knight,		Stonehouse v. De Silva -	142
		Storks,	

# TABLE OF REPORTED CASES.

	Page		Page
Storks, <i>Ex parte</i> .—In the		the Matter of Brick-	
Matter of Evans -	179	wood and Co., and in	
Stuart, <i>Ex parte</i> .—In the		the Matter of Bracken	
Matter of Leicester -	215	and Co. -	182
Sutton, <i>Ex parte</i> .—In the		Warner v. Barber -	433, 469
Matter of Changeur -	86	Warner v. Barber -	469
T.		Watson, <i>Ex parte</i> -	259
Tarn v. Heyes -	475	Wells, <i>Ex parte</i> .—In the	
Taylor v. Kinloch -	474	Matter of Roberts -	378
Taylor, <i>Ex parte</i> .—In the		Weston, <i>Ex parte</i> -	450
Matter of Elgar -	175	Wheelwright v. Jackson -	127
Taylor, <i>Ex parte</i> -	441	Whitehead, in the Matter	
Taylor v. Kinloch -	474	of Alston -	358
Taylor v. Sir Thomas		Whitworth v. Davies -	116
Plumer -	456	Whitworth v. Graham -	364
Temple, <i>Ex parte</i> .—In the		Williams, <i>Ex parte</i> -	142
Matter of Temple -	22	Wilkins v. Fry -	371
Thackwaite v. Cock -	106	Wilkinson v. Wilkinson -	444
Thomas v. Rhodes -	104	Willock, <i>Ex parte</i> .—In	
Todd, in the Matter of		the Matter of Dawes -	392
Watson -	202	Wilson and Another v.	
Tomlinson, <i>Ex parte</i> .—In		Kemp -	268
the Matter of Ker-		Windham v. Paterson -	466
shaw -	66	Wood v. Dodgson -	47
Topham, <i>Ex parte</i> -	445	Wright v. Brown -	39
Trigwell, <i>Ex parte</i> -	109	Wright, <i>Ex parte</i> .—In the	
V.		Matter of Shuttleworth -	244
Vincent and Others, As-		Wylie, <i>Ex parte</i> .—In the	
signees of Dawson, v.		Matter of Humble -	393
Prater -	275	Y.	
W.		Young, <i>Ex parte</i> -	78
Wall v. Atkinson -	196	Young, <i>Ex parte</i> .—In the	
Walker v. Barnes -	279	Matter of Slaney -	41
Ward, <i>Ex parte</i> -	113 N.	Young v. Hunter -	120
Waring, <i>Ex parte</i> .—In		Young v. Wright -	472



# C A S E S

## IN

### BANKRUPTCY, &c.

---

*Es parte* BRYANT.

*Dec. 17, 18,*  
*22, 1812.*  
*Feb. 1,*  
*March 18,*  
*May 11, 1813.*

**BRYANT** was an Attorney. From his frequent Attendance at the Sales of Books, of which he was then a Collector, he became so well known to that Trade, and so far mixed in the Habits and Dealings of it, as to be

An Assignee sustaining a litigated Commission, is entitled to his

Costs out of the Estate, as between Attorney and Client.

The Court will restrain a Bankrupt, controverting his Bankruptcy, from vexatiously bringing Actions against his Assignees: but will not so interfere, upon the Ground that the Bankrupt has failed upon the Trial of one Action, and an Application for a new Trial; and was about to bring a second Action.

Where the Court directs an Action to be brought to try the Bankruptcy, it suspends in the mean Time the Proceedings under the Commission; but if the Action establishes the Bankruptcy, it will not, without special Ground, allow a longer Suspension: nor is it a sufficient Ground, that the Bankrupt is about to bring another Action, and therein to put his Objection to the Commission upon the Record, in Order to carry it by Writ of Error to the House of Lords.

The Payment of the Creditors under the Commission, as it would be sufficient to induce a Supersedeas, is a Ground for staying the Proceedings: but the Funds proposed for that Purpose must be fully and immediately applicable.

1813.  
 Ex parte  
 BRYANT.

considered a "*Knock out*"—that is, of the Number of those, who withholding their Competition against each other at the Auction, dispose by a subsequent Arrangement amongst themselves of the Lots withdrawn from the Enhancement of the general Biddings. In the Course of these Pursuits he became indebted to *Stewart*, who took out a Commission of Bankrupt against him as a Bookseller.

*Bryant* disputing his Liability to the Bankrupt Laws, preferred a Petition to the Lord *Chancellor* for a Superseas of the Commission. He stated the three following Objections to it :

1st. That *Stewart*, as Petitioning Creditor, had made an Affidavit of a Debt for Goods sold and delivered (*a*), although he had at that Time entered up Judgment in an Action brought for the Amount of the Goods : the simple Contract Debt, therefore, was extinguished by the Judgment, and the Affidavit did not speak to the Truth and Reality of his Debt.

2d. That there were a Petitioning Creditor's Debt and an Act of Bankruptcy antecedent to *Stewart's* Debt.

3d. That *Stewart* had not, previously to preferring his Petition to the Lord *Chancellor* for the Commission, relinquished his Action at Law, and the Judgment obtained in it.

Upon the Hearing of the Petition, the Lord *Chancellor* declared his Opinion to be against the Objections. But in Order that the Facts, in Respect of which considerable Difference subsisted between the Parties, might be more satisfactorily disposed of than upon Affidavit, *Bryant* was permitted to bring an Action. The Result was a

(a) 1 Vol. p. 288. 1 *Ves. v. Beames*, 211. 506.

Verdict establishing the Petitioning Creditor's Debt, the Act of Bankruptcy, and the Trading. An Application was made to the Court of *Common Pleas* for a new Trial, and refused; and his Petition to the Lord Chancellor was dismissed, with Costs, as between Attorney and Client, to be paid to the Assignees out of the Estate.

1813.  
*Ex parte*  
 BRYANT.

*Bryant*, as yet unconvinced of the Validity of his Bankruptcy, presented another Petition, and reiterated his Objections. He stated his Anxiety to submit the Question to the Consideration of the House of Lords; and his Intention, unless the Lord Chancellor should himself think fit to refer it thither, to bring an Action in the Court of *King's Bench*; to raise the Objections upon the Record; and to carry them to the Dernier Resort (a) upon a Writ of Error. He therefore prayed, that in the mean Time his Examination and the other Proceedings under the Bankruptcy might be stayed; and alleging that he was seised of an Estate, called the *Waltingham* Estate, more than adequate to the Payment of his Debts, he proposed that it should be sold immediately, and the Proceeds applied to that Purpose; and he offered to join in the necessary Conveyance. On the other Hand, the Assignees submitted to the Court the Hardship of their being thus harassed with the repeated Actions of the Bankrupt; that the *Waltingham* Estate was unmarketable and unproductive; that the Bankrupt ought to be restrained from further litigating his Commission, and be compelled to acquiesce in it. Upon this Petition the Bankrupt appeared in Person: he was opposed by Mr. *Richards*, Mr. *Hart*, Mr. *Wilson*, and Mr. *Montague*.

(a) *Bryant v. Withers*, post, 8.



1813.

*Ex parte*  
BRYANT.

*The Lord CHANCELLOR.*

I do not very correctly recollect on what Points this Petition was formerly argued, but if they resolved themselves into Objections to the Trading, the Act of Bankruptcy, and the Petitioning Creditor's Debt, one only of two Courses was open to me : either to decide it on the Affidavits myself, or to send it to another Jurisdiction, where it could be disposed of more satisfactorily by oral Examination. The latter Course was adopted ; *Bryant* was permitted to bring an Action. In that, and upon an Application to the Court of *Common Pleas* for a new Trial, he was equally unsuccessful, and his Petition was dismissed. It has been observed upon, as something extraordinary, that the Order dismissing the Petition directed the Costs to be paid to the Assignee, as between Attorney and Client : I apprehend, however, that to be quite regular. As a Bankrupt, whenever he thinks fit, can bring an Action against his Assignee, what Person would accept the Office, if he were not to be completely indemnified ? An Assignee is placed in a Situation of great Peril ; to sustain the Interests of all the Creditors as well as his own ; answerable for every Shilling of the Property administered under the Bankruptcy, in the Event of the Commission being defeated.

In this Case, where my own Opinion is so strongly coincident in the Result of the Proceedings at Law, I do not know any Method of submitting these Questions to further Investigation. The Legislature has said my Decision shall be conclusive ; at the same Time, I do not feel inclined to restrain the Bankrupt from the further Experiment of another Action at Law, if he is advised to have Recourse to it. This Court will undoubtedly injoin a Bankrupt from vexatiously and repeatedly bringing Actions against his Assignees ; but I do not believe that  
it

it has ever considered his Failure in the first Action, as a Reason for interposing against a second.

1813.

*Ex parte*

BRYANT.

The Proposal to apply the Proceeds of the *Walwingham* Estate in Satisfaction of the Creditors deserves great Attention. If the Court saw clearly that it was sufficiently and immediately applicable to their Payment, it would not permit a Commission to go on merely for the Purpose of having a Debt satisfied at a greater Delay and Expense. The Practice (a) of superseding a Commission upon Payment of the Creditors who have proved under it, is conducive to an analogous Interference upon a Proposal of this Nature. I do not, however, recollect an Instance in which the Court would so interfere, unless perfectly satisfied that that Proposal could be fully and speedily effectuated.

As to staying the Proceedings, it is unnecessary to cite Precedents that where the Validity of the Commission is disputed, the Court has and will exercise that Jurisdiction (b).

When the Court itself directs an Action to try the Validity of a Commission, the Court will consistently with that Direction stay the Proceedings in the mean Time; but I believe there is no Instance, unless under extremely special Circumstances, differing much from those upon which the Petitioner relies, in which the

(a) *Ex parte Duckworth*, alleged to be sufficient for the Payment of the Creditors. 16 Ves. 416.

The Lord Chancellor refused to stay the Progress of a Commission, upon an Offer to pay into the Name of the Accountant-General a Fund

*Ex parte Kemp*, *Lincoln's Inn Hall*, Sittings after Trinity Term, 1814.

(b) *Ex parte Williams*, MS. SP.

Court

1813.

*Ex parte*  
BRYANT.

Court has stayed the Proceedings after the Commission has been established at Law. That the Bankrupt has brought a second Action is not in itself a Ground for such Suspension. I will not dispose of the other Ground, viz. the Proposal to pay the Creditor with the Proceeds of the *Waltingham* Estate, until the Amount of the Debts and the Value of the Estate have been ascertained.

The Lord Chancellor subsequently ordered an Inquiry into the Validity of *Bryant's* Title to the *Waltingham* Estate, and the Value of it; and if not satisfactory and sufficient for the Payment of the Creditors, the Proceedings and Examinations under the Commission to go on in the ordinary Course.

*Vide Bryant v. Wilhers, p. 8. post.*

March 18,  
1813.

*Ex parte* STEWART.—In the Matter of BRYANT.

The Petitioning Creditor directed to have the Management of the Defence to an Action brought by the Bankrupt to try the Validity of his Commission; but the Assignee to be fully indemnified.

THIS was an Application in the same Bankruptcy, that either the Assignee might be dismissed, or that *Stewart*, the Petitioning Creditor, might be admitted in his Place to manage the Defence to the Action that *Bryant* had brought in the *King's Bench*: it was alleged that the Assignee was not a Creditor, and was so much identified in Interest with the Bankrupt, that the Action would not be properly tried if he defended it.

*Stewart* offered to indemnify the Assignee; and one of the Questions much agitated was, whether the Indemnity should include Expenses incurred antecedent to the Petitioning Creditor's taking that Defence upon himself, or merely from that Time.

*The*

*The Lord* CHANCELLOR.

I think the Petitioning Creditor must be bound in Respect of that antecedent Expense, unless there be something in the Conduct of the Assignee, that he should not. Where the Question is, whether an Assignee who has no Interest, as a Creditor in the Estate, and the Petitioning Creditor, upon whom ultimately a great Deal of Expense must fall, shall have the Superintendence of an Action of this Nature, the latter must be preferred : there is nothing, however, to vary the ordinary Terms upon which he must have it, unless there has been Misconduct on the Part of the Assignee.

1813.

*Ex parte*

STEWART.—In  
the Matter of  
BRYANT.

Let Mr. *Stewart* have the Conduct of defending the Action, fully indemnifying the Assignees.

BRYANT

In the  
KING's  
BENCH.

*Michaelmas*  
*Term, Friday,*  
*November 12,*  
1813.

BRYANT v. WITHERS.

A Commission of Bankrupt sustained against the three following Objections :

1st. That the  
Petitioning  
Creditor had,

upon striking the Docket, made an Affidavit of his Debt as for Goods sold and delivered, although he had at the Time obtained Judgment in an Action brought to recover the Amount of the Goods.

2d. That prior to the Act of Bankruptcy upon which the Commission issued there was another Act of Bankruptcy, with a Debt sufficient to sustain a Commission, and of that the Petitioning Creditor had Notice.

3d. That prior to presenting the Petition for a Commission, the Petitioning Creditor had not relinquished his Judgment.

The Court being of Opinion, as to the first Objection, that all the Statute, 5 *Geo. II. c. 30, s. 23*, required, was in Truth and Reality a Debt of sufficient Amount; as to the second, that it was not competent to the Bankrupt to defeat a Commission against him by alleging the Criminality of another Act of Bankruptcy; as to the third, that the Statute 49 *Geo. III. c. 121, s. 14*, only applied to Creditors who came in to prove their Debts:—Plea, justifying a Trespass under a Statute passed in the second Year of *James I.* held to be bad; for although the Parliament in which the Act passed was continued to the second Year of that Reign, yet the Reference to the first Day of the Sitting not being expressly excluded, determines the Date of the Act.

“ for

"for Bankrupts;" and thirdly, by Virtue of the Act made in the first Year of the Reign of King *James the First*, intituled "An Act for the better Relief of Creditors against such as shall become Bankrupts;" and lastly, by Virtue of the Statute passed in the second Year of *James the First*, for the same Purpose (a).

1813.  
BRYANT  
v.  
WITHERS.

These Pleas were met by three several Replications.

First, that the several Trespasses mentioned in the Declaration were done and committed by Virtue of a Commission of Bankrupt awarded and issued against *William Bryant*, bearing Date at *Westminster* the 17th *August* 1810, and that it issued upon the Petition of *William Stewart*, a Creditor of the said *William Bryant*, before the issuing of the Commission exhibited to the Lord *High Chancellor*; and that by Virtue of the Commission, *William Bryant* was found and declared a Bankrupt, upon an alleged Act of Bankruptcy, by lying in Prison two Months, on a Declaration for Debt on a Committal to Prison, on the 11th of *April* 1807; and that before the said Commission was awarded or issued, and in Order to obtain the same, namely, on the 13th of *July* 1810, *William Stewart*, the Petitioning Creditor, made an Affidavit that he, *William Bryant*, was indebted to him in the Sum of £100, for Money lent and advanced to him; and that the Affidavit was made by *William Stewart* as the Petitioning Creditor, and that the Commission was awarded on the Affidavit: that after the committing the Act on which he was found and declared a Bankrupt, and before the Time of making the Affidavit, namely in *Trinity*

(a) The Difference between Parliament was passed in the the two last Pleas was in- first or second Year of the troduced on Account of a Reign of *James the First*.  
Doubt, whether the Act of

Term,

1813.  
  
 BRYANT  
 v.  
 WITHERS.

Term, in the 50th Year of the present King, the Petitioning Creditor had recovered against him a Judgment for £1065, for his Damages and Costs; and that this Judgment was signed on the 6th of *July*, in the 50th Year aforesaid, and not before: that the Sum of £100, in which *William Stewart*, by his Affidavit, swears he was indebted to him, was included in the Damages for which the said Judgment was recovered, and was Part of the said Sum of £1056 therein mentioned; and at the Time of making the Affidavit was not, but had ceased to be, a Debt for simple Contract, and was merged in and extinguished by the Judgment, and was a Debt of Record: and that at the Time of making the said Affidavit, and of awarding the Commission, he was not, nor at any Time since has been, nor is, indebted to the said *William Stewart* in any other Sum, or in any other Manner than by the Judgment.

Second, that long before the Time of the awarding and issuing the Commission of Bankrupt in the Replication to the said second Plea mentioned, and long before the contracting the Debt to the said *William Stewart*, upon whose Petition the said Commission in the said second Plea mentioned was awarded and issued, and upon which Debt the said Commission was grounded, namely, on the 30th *August* 1806, he the said *William Bryant* was a Prisoner for Debt, and detained as a Prisoner for Debt in the actual Custody of the Warden of His Majesty's Prison of the *Fleet*, and remained and continued and lay in Prison upon the said Detention for two Months and more, namely, until the 13th *November* last aforesaid; and that at and during the Time of such his Detention he was a Trader, and was indebted to *John Flight* in the Sum of £100 and upwards for a just and true Debt, then and still due and owing, and that the same was a good and sufficient Petitioning

tioning Creditor's Debt to support a Commission of Bankrupt against him; and that he by so lying in Prison, under a Detention for Debt for two Months and more, committed an Act of Bankruptcy, and could and might have been found and declared a Bankrupt; and that long before the Time of awarding and issuing the Commission of Bankrupt in the Replication to the said second Plea mentioned, and before he was indebted to the said *William Stewart* on the Judgment recovered, or in the Money mentioned in the Affidavit of the said *William Stewart*, he was a Trader, had committed an Act of Bankruptcy, and was indebted to the said *John Flight* in a Sum sufficient to form a good and sufficient Petitioning Creditor's Debt, and whereon a Commission of Bankrupt could and might have been awarded and issued against him; and that the said *William Stewart* at the Time the Debt to him was contracted, and on which he grounded his Petition for the Commission of Bankrupt, and under and by Virtue of which the Trespasses are attempted to be justified, and at the Time he made the said Affidavit in the Replication to the said second Plea mentioned, and petitioned for the said Commission, had full Notice that the said *William Bryant* had committed such prior Act of Bankruptcy, by lying in Prison for two Months, as in the Replication mentioned.

Third, that the said *William Bryant*, after he had committed such Act of Bankruptcy as in the Replication to the third Plea mentioned, and after the said *William Stewart* had Notice of such prior Act of Bankruptcy, and before the awarding and issuing the said Commission of Bankrupt, and under and by Virtue of which the several Trespasses are attempted to be justified, the said *William Bryant* became and was indebted to the said *William Stewart* in divers large Sums of Money, amounting in the whole

1813.  
BRYANT  
v.  
WITHERS.



1813.  
 BRYANT  
 v.  
 WITHERS.

whole to £3700, and did at divers Periods after committing the said prior Act of Bankruptcy, and after the said *William Stewart* had Notice thereof, and before the awarding and issuing the Commission, pay to the said *William Stewart* divers large Sums of Money, amounting to £3,000, Part of the Money in which he was indebted to him; and that the said *William Stewart* afterwards, and long before the issuing of the Commission of Bankrupt in the Replication to the second Plea mentioned, namely, in *Hilary* Term, in the 48th Year of the present King, proceeded and recovered a Judgment against him for £1056, for his Damages and Costs, which Judgment, at the Time of issuing the Commission, was and still is in force; and that after the Judgment, the said *William Stewart* exhibited his Petition to the Lord Chancellor for the Purpose of causing a Commission of Bankrupt to be awarded and issued against him, and that upon such Petition the Commission was awarded and issued; and that the said *William Stewart* did not, before he presented such Petition and caused such Commission to be issued, relinquish the said Action or Suit so brought.

To these Replications there was a Demurrer, and a Joinder in Demurrer.

*Abbot*, in Support of the Demurrer.—The Sum of the first Replication is, that the Commission issued upon an Affidavit stating the Debt to be for Money lent and advanced, but before the issuing of the Commission, the Petitioning Creditor had recovered a Judgment, and thereby made the Debt of a higher Nature; his Affidavit was therefore incorrect and insufficient. To this Objection, however, the Case of *Ambrose v. Clendon*, 2 *Strange* 1042, and more fully reported in the Cases *Temp. Hardwicke* 267, is an Answer. In that Case there was a simple Contract Debt, then an Act of Bankruptcy, and afterwards

wards a Bond given. Lord *Hardwicke* says, "as to the second Question," &c. (a).

1813.  
BRYANT  
v.  
WITHERS.

To the second Replication (b) there are two Answers, one of which applies to all the Replications, *viz.* That it is not competent to the Bankrupt himself to defeat a Commission by setting up a prior Act of Bankruptcy,

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(a) "As to the second Question, I think this Petition is sufficient to support the Commission, and that the Acceptance of the Bond is not an Extinguishment of the Debt, as to this Purpose; for the only Question now is, whether there was a Debt subsisting sufficient to support the Commission, and not of what Effect it is with regard to the Bankrupt himself. The Reason why it is an Extinguishment with regard to the Party, is because the Bond is a Debt of a higher Nature; but in this Proceeding both Debts are the same, and it is every Day's Practice, that if a Creditor, by simple Contract, should, after an Act of Bankruptcy committed, get a Judgment confessed by the Bankrupt for the same Debt, "and take the Bankrupt's Goods in Execution, if the Assignees bring an Action of Trover against that Creditor to recover, yet that every Creditor is afterwards admitted to come in and prove his Debt under the Commission, notwithstanding his Acceptance of a Judgment after the Bankruptcy; and he comes in that Case by Force of his simple Contract Debt, for all Creditors are entitled to Relief under the Commission: so that with regard to the Commission he is still considered as a simple Contract Creditor, therefore I think the Acceptance of the Bond has not, as to this Proceeding, extinguished his simple Contract Debt, so that I think the Commission is well founded."

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(b) The Court early in the Argument intimated their Opinion to be for the Defendant, upon the first Replication; and that as to the Rest, the Question would be merely for Costs. The Defendant's Counsel, however, expressed their Desire to have all the Objections to the Commission disposed of, in Order to shelter themselves from further Litigation.

though

1813.  
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 BRYANT  
 v.  
 WITHERS.

though accompanied by contemporaneous Facts that shew a Commission might have issued. *Donovan v. Duff*, 9 East. *Mercer v. Wise*. 3d Esp. 219. *Bullock's Case*: 1 Taunton 71.

The Substance of the third Replication is, that the Petitioning Creditor having recovered a Judgment after the Act of Bankruptcy, ought, within the 49 Geo. III. c. 121, to have relinquished that Judgment before he presented his Petition as Petitioning Creditor; that Act, however, applies only to actual Proof or Claim under the Commission.

*Holroyd*, in Support of the Replications.—The first Replication is in Substance as has been stated, that the simple Contract was gone, and being gone there was no good Petitioning Creditor's Debt, because the Judgment was subsequent to the Act of Bankruptcy: prior to the late Act of Parliament, 49 Geo. III. c. 121, any Person who became a Creditor after the Act of Bankruptcy could not prove under the Commission. Although that Act has in this Respect introduced an Alteration in Respect of the Admission of the Proof of a Debt contracted after an Act of Bankruptcy, it left untouched the Law which required that a Debt to support a Commission should be antecedent to the Act of Bankruptcy. A Petitioning Creditor cannot take out a Commission founded on an Act of Bankruptcy prior to his Debt. The Petitioning Creditor had no other Debt but his Judgment; this Commission is bad. In *Ambrose v. Clendon*, the Bond being taken after the Bankruptcy, was taken on the Supposition that the Party was solvent. But it being discovered that an Act of Bankruptcy had been committed, the Commission was taken out on the original Debt. But here the Judgment is an Act of Record.

The

The second Plea states that the Defendant was justified in committing the Trespasses complained of under the Act of 1 *James I.*, the last Plea stating, that he was justified in the 2 *James I.* upon the Idea that the other Allegation was wrong. The Act of Parliament is stated as made in the second Year, *vulgo primo*, of *James the First*. By the Statute Roll it appears it was made in the first Year of *James the First*; that the Parliament met on such a Day, was continued to such a Day, and prorogued to such a Day, by different Prorogations; and then the Parliament is stated to be holden on that Day. This plea does not so state it; but it states that the Trespasses were justified by the Act of Parliament passed in the first Year of *James the First*.

1813.  
BRYANT  
v.  
WITHERS.

*Dampier, J.*—One or the other must be bad. Queen *Elizabeth* died on the 24th *March* 1603, the Accession of *James the First*; the Parliament began on the 19th *March* subsequent; the 24th *March* was the last Day of the first Year. If you look to the Statute you will see that Parliament met the 19th *March*.

*Holroyd.*—The Parliament began on the 19th of *March* 1604, was continued to the 7th *July*, and then prorogued to the 7th *February*. An Act made in the second Year cannot be an Act made in the first. The Replication to the last Plea depends upon the Question, whether, without relinquishing the Judgment, this Commission could be sued out. Now when the Act of Parliament says he shall relinquish before he proves, suppose that Mr. *Bryant* was in Prison upon mesne Process; that he remained in Prison on the Judgment, and was kept till after the issuing of the Commission; that cannot be called a Relinquishment of the Judgment.

Lord *Ellenborough*, C. J.—All that the Statute requires

1813.  
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 BRYANT  
 v.  
 WITHERS.

quires is the Reality and Truth of the Debt. The Debt was not the less an existing Debt at the Time of the Commission, because the Quality of it for certain legal Purposes had been changed. The Change in the Quality and Character of the Debt can have no substantial Operation against the Object of the Act of Parliament, which is satisfied by stating, that the Money was lent and advanced. With respect to his setting up a prior Act of Bankruptcy, is it to be contended that the Bankrupt is to have the Privilege of pleading that he was criminal *autrefois*, in Order thereby to defeat his Commission? There is no Foundation for such a Supposition. The Creditor, whose Debt is antecedent to the Act of Bankruptcy by which the Commission is to be defeated, may never intend to resort to that Process, and for a mere conjectural Commission you are to overturn one in Operation; if you overset the existing Commission, the other never may be issued, probably never will. As to the last Objection, upon 49 *Geo. III.* if the Creditor does not prove, the Statute does not apply; the Court considers the Proof as an Election, and the Election a Relinquishment—it is a virtual *non pros*. What do you say, Mr. *Abbot*, as to the Year of the Act of Parliament of *James the First*?

*Abbot.*—The Title of the Session begins in Latin, *Anno Regni Jacobi Regis Angliæ, Scotiæ Franciæ, and Hiberniæ, viz. Angliæ, Franciæ, and Hiberniæ, secundo vulgo primo, and Scotiæ tricesimo primo.* At the Parliament began and holden at *Westminster* the 19th Day of *March*, in the first Year of the Reign of our most Gracious Sovereign Lord, *James*, by the Grace of God, of *England, France, and Ireland*, King, Defender of the Faith, &c. and of *Scotland* the 39th, and there continued until the 7th Day of *July* 1604, and thence prorogued until the 7th of *February* next following, to the High Pleasure of Almighty God, and the Public Weal of this Realm,  
 were

were enacted as followeth. There is nothing by which it can be decided with Certainty at what Time each particular Act of Parliament passed; whether before or after the End of the Year is not to be collected; but as the Rule is, that an Act of Parliament shall relate to the first Day of the Session, of Course this must relate to the first Day on which it began. There is nothing on the Face of the Act by which the Court can attribute it to any particular Period, there being nothing to shew that the Act did not pass in the first Year. It must be referred to the first Day of the Session, and be considered to have passed in the first Year of the Reign of *James the First*.

1813.  
BRYANT v.  
WITHERS.

*Lord Ellenborough.*—Though it is stated that Parliament was continued by Prorogation to such a Day, it is not stated when the Act of Parliament passed, and therefore unless expressly excluded, it must be referred to the first Day of the Sitting of Parliament.

*Per Curiam,*

Judgment for the Defendant on the first and second Pleas.

In the Matter of BRYANT.

Nov. 25,  
1813.

**A**FTER the Determination of the preceding Case in the Court of *King's Bench*, the Assignee applied to the Lord Chancellor, for the Directions and Indemnity of the Court in the Discharge of his Duty as Assignee, the Bankrupt intending to carry the Case to the House of Lords.

An Assignee must consider the Commission under which he derives his Authority to be valid, and act

under it at his own Risk and Responsibility. The Lord Chancellor not having Jurisdiction to indemnify him against the Consequences of a Supersedeas.

1813.

In the Matter of  
BRYANT.

*The Lord CHANCELLOR.*

I have no Authority to indemnify an Assignee against the Consequences of his Situation, nor prevent his Liability to the Bankrupt in Respect of the Property disposed of under the Commission, if the Commission be superseded. I therefore can give him no Directions. He must, while he continues Assignee, consider the Commission under which he derives his Appointment as a valid Commission, act accordingly, or remove himself from that Situation.

I do not sit here to advise Assignees how to act, except indeed upon Petitions complaining of their Misconduct in not acting, and praying that they may be compelled so to do; an Assignee must, like any other Trustee, act upon the best Advice he can get.

The Objections, in Point of Law, urged by the Bankrupt against his Commission, have been decided unanimously against him in the *King's Bench*, upon Demurrer. My Opinion now is of little Consequence upon those Points, because I have, on a former Occasion, delivered it in Coincidence with that of the Court of *King's Bench*.

Nothing now remains undecided at Law but the General Issue, and it therefore brings this Case back to a second Litigation on the same Ground upon which it has once already been tried under the Direction of this Court. I cannot therefore but consider this as a valid Commission, the Creditors have a Right to insist upon a due Prosecution of it, and the Assignee must at all Hazards act in the Discharge of his Trust.

*Ex parte*

*Ex parte* NEWTON.

Nov. 13,  
1813.

**T**HIS Petition raised a Question of Practice, whether the Depositions, upon which Commissioners in the Country had founded their Report, upon a Subject of Inquiry referred to them, ought to be filed with the Report in the Bankrupt Office, or left in the Custody of the Assignees. The Depositions were not annexed to or incorporated in the Report, or referred to as forming Part of it; and the Officers of the Bankrupt Office had therefore refused to file them.

Depositions, upon which Commissioners have founded a Report, upon a Reference to them, are Proceedings in the Bankruptcy, and as such, to be left in the Custody of the Assignees.

*The Lord* CHANCELLOR.

These Examinations are Proceedings in the Bankruptcy, and should remain therefore with those who have the Custody of the Proceedings; where, if necessary, a Party entitled to inspect them may have an Order for that Purpose. The Report alone is all that should be filed in the Bankrupt Office.

The filing of an Affidavit in Bankruptcy is the swearing and carrying of it into the Bankrupt Office; it is there within the Reach of the Lord Chancellor, should the Purposes of Justice at any Time require the Production of it.

It was at Length agreed between the Parties, that the Depositions should be sealed up and left at the Bankrupt Office.

Another Point raised was, as to what constituted the filing of an Affidavit.



Nov. 16,

1813.

*Ex parte*

NEWTON.

*The Lord CHANCELLOR.*

I have always understood the filing of an Affidavit to be the swearing and carrying of it into the Office; when an Affidavit has been brought into the Office, it will never, I trust, in future be suffered to be withdrawn upon any Pretext. If an Affidavit has been read without having been filed in the Office, I might have some Difficulty in compelling the Reproduction of it, if the Purposes of Justice required it.

Sir *Samuel Romilly*, in Support of the Petition.

Mr. *Montague*, *contra*.

IN the Matter of BALDWIN.

**M**R. *Cook* moved that a clerical Error in a Commission might be corrected, and certain Words omitted might be inserted, and the Commission resealed; at the same Time expressing a Doubt, whether the Error and Omission in Question were such as to render any Alteration or Resealing necessary.

The Error was "*Balwin*," instead of "*Baldwin*," and omitting to describe him as surviving Partner of a Person deceased.

*The Lord CHANCELLOR.*

It is *idem sonans*; and the Omission of his Description as surviving Partner is the Omission of a mere Surplusage.

*Ex parte*

*Ex parte* PRESTON.—In the Matter of PRESTON.

Nov. 19,  
1813.

**T**HIS was an Application by a Bankrupt, to supersede his Commission, upon an Objection to the following Act of Bankruptcy.

It is not an Act of Bankruptcy for a Debtor to cause himself to be denied to a Creditor calling by the Debtor's Appointment, for Payment, on a Sunday.

*Preston* being indebted to *Popple* in £100 and upwards, accidentally met him in the Street; *Popple* pressed him for Payment. *Preston* said, Come and dine with me on Sunday, and I will settle with you. *Popple* went on Sunday; when a Servant of *Preston*, by his Desire, he being then at Home, told *Popple*, that he was gone out to Dinner, and *Popple* went away. The Servant then told her Master what had taken Place, and he approved of it.

Sir *Samuel Romilly* and Mr. *Barber*, in Support of the Petition.

Mr. *Hart* and Mr. *Johnson*, contra.

The LORD CHANCELLOR.

Nov. 30.

The Act of Bankruptcy on which this Commission is grounded is a Denial to a Creditor on a Sunday. I am of Opinion, after great Consideration of this Subject, that if the Petitioner did appoint Sunday to pay the Money, it is not an Act of Bankruptcy in him, to cause himself to be denied to a Creditor on that Day. This Commission, therefore, must be superseded at the Expense of the Petitioning Creditor.

*Ex parte*

LINCOLN'S  
INN HALL,  
1814.

*Ex parte* TEMPLE.—In the Matter of TEMPLE.

A Bankrupt is not, by Virtue of the Commissioners' Protection, privileged from Arrest at the Suit of the Crown, unless he be in actual Attendance before them; and the Exception seems to include a fair Allowance of Time for going and returning.

THE Commissioners, at the Expiration of the forty-two Days, enlarged the Time for the Bankrupt's passing his last Examination and extended his Protection. Upon one of the Days previous to the Expiration of such enlarged Time, but not while in Attendance before the Commissioners, or on his Way to or from them, he was arrested under a Writ of Extent at the Suit of the Crown, for a Debt due to the Commissioners of Excise. He now petitioned that he might be discharged from such Arrest, with his Costs and Expenses to be paid by the Officer who had executed the Writ, or by such other Person as the Lord *Chancellor* should direct.

Mr. *Wakefield*, in Support of the Petition, cited *Ex parte Russell*.

Mr. *Montague*, for the Assignees, supported the Bankrupt's Application, upon the Ground that his Detention in Custody would interfere with his Examination and the Interests of the Creditors under the Commission.

Sir *Arthur Piggott* and Mr. *Hall* resisted the Application; contending that the Crown was not within the Provisions of the Bankrupt Statutes; and that the Principles of Common Law, as acted upon in *Ex parte Russell*, carried the Protection no farther than while the Bankrupt was in Attendance actually before the Commissioners.

*The Lord CHANCELLOR.*

My present Opinion is, that the Bankrupt is not protected

tected in this Case. Lord *Hardwicke* decided in *Ex parte Dick* (a), and I observe that I followed it in *Ex parte Russell* (b), that the Crown was not within the Statutes in Bankruptcy. I should require a great Deal to satisfy me that the Crown is bound by Implication (c), when all judicial Proceedings, both upon Practice and Principle, have established the contrary. The Case of *Ex parte Russell* carried this no farther, than that the Bankrupt was protected from an Extent at the Suit of the Crown, while in actual and *bonâ fide* Attendance before the Commissioners. Neither the Facts nor the Judgment in that Case admit the Inference, that the Crown is bound by the Statutes in Bankruptcy. I carefully stated, that the Crown was not bound, and the Relief was given upon the Principles of Common Law, protective of a Witness attending a Court of Law, in Aid of the Administration of Justice. I took the Circumstance of his having been before the Commissioners, and his waiting during their Adjournment, as one Attendance; that he was as much protected, in the Room to which he had retired, as a Witness walking about *Westminster Hall*, until he shall be called into the Witness Box. Whatever Doubts may have existed, it is now quite clear that a Witness attending Arbitrators under a Reference by Rule of Court, is entitled to his Protection, and that not by the Statute, but by Common Law (d). Except by the Stat. 5 *Geo. II.* there was nothing to restrain a Creditor from arresting his Bankrupt Debtor during the forty-two Days: by Common Law he was

1814.

*Ex parte*

TEMPLE.—In  
the Matter of  
TEMPLE.

- (a) 2 *Black. Rep.* 1142. 18 *Ves. Rep.* 1.  
(b) 1 *Rose's Cases*, 278. (d) Bail attending to justify  
*Vide Ex parte Ross*, and the are protected from Arrest on  
Cases in the Note, 260. *ibid.* mesne Process. *Rimmer v.*  
and the next Case, p. 24, *post.* *Green.* 1 *Maule and Selwyn*,  
(c) Note to *Ex parte Wood*, R. 638.

at

1814.

*Ex parte*TEMPLE.—In  
the Matter of

TEMPLE.

at Liberty to do so, and the Crown not being within the Provisions of that Statute, there is no Principle of Common Law, which, in this Instance applicable to the Crown, entitles the Bankrupt to be discharged.

Petition dismissed.

LINCOLN'S

INN HALL,

Feb. 24,

1814.

*Ex parte* LIST.—In the Matter of CUMMING.

A Creditor attending to prove his Debt is protected from Arrest.

*WILLIAM LIST*, a Creditor, having been arrested upon his Return from proving his Debt under this Commission, now moved, upon a Petition presented, to be discharged out of the Custody of the Sheriffs of *London* at the Cost, Charges, and Expenses of the Attorney in the Action, and of the Officer who had executed the Writ.

Sir *Samuel Romilly* and Mr. *Rose*, in Support of the Motion.

Mr. *Leach*, *contra*.

*The Lord* CHANCELLOR.

A Creditor attending to prove his Debt is clearly entitled to the same Protection as a Party attending the Prosecution of his Suit in a Court of Justice. The same Principle that protects a Witness, attending to establish by his Evidence the Debt of another, ought to protect a Person attending, in the Method prescribed by the Legislature, to establish his own.

Let *List* be discharged, but reserve the Question of Costs until I shall have had an Opportunity of learning from

from Mr. Justice *Le Blanc* upon what Ground he had declined to interfere, upon the Summons taken out before him at Chambers (a).

*The Lord CHANCELLOR*

This Day ordered *List* to be discharged, with his reasonable Costs and Expenses to be paid by the Solicitor and the Officer.

*Vide* the preceding Case.

(a) Upon the Arrest taken on the other Hand it was stated that Mr. Justice *Le Blanc* had expressed no Doubt of the Creditor's being entitled to his Protection; but referred him to the Lord *Chancellor*, within whose Jurisdiction he considered the Case to lie. It was with Reference to these different Statements that the Lord *Chancellor* reserved the Consideration of Costs.

1814.

*Ex parte*

*LIST*.—In the  
Manner of  
*CUMMING*.

*March 2.*

*Ex parte SMITH*.—In the Matter of ROBERT  
MARTIN JACKSON.

LINCOLN'S  
INN HALL,  
*April 15,*  
1814.

AN Objection was raised to the Validity of this Commission, that the Bankrupt was described in it by the Names of *Robert Martin Jackson*, his Name in Fact being only *Robert Jackson*; it appeared, however, that he had himself adopted and used the Name of *Martin*.

*The*

1814.

*The Lord CHANCELLOR.**Ex parte*

**SMITH.**—In known by the Name which he himself has adopted and the Matter of used. If the Bankrupt has been advised that this Com-  
**ROBERT MAR-** mission is a Nullity, and acts under that Advice, he will  
**TIN JACKSON.** find himself very much mistaken.

May 14,

1814.

*Ex parte* PACHELOR.

The Existence of a prior separate Commission invalidates a subsequent joint one.

But for the Convenience of administering the joint Proceedings, the Court will, by superseding the separate Commission, give Effect to the joint one, unless there be a strong Reason against the

ON the 23d of *April*, 1814, a separate Commission issued against one of two Partners; on the 30th of *April* a joint Commission issued against both. This was an Application that the separate Commission might be superseded. It was admitted that there were joint Effects and joint Creditors, and that the Creditor at whose Instance the joint Commission had been issued claimed a Debt of £3000; the Creditor at whose Instance the separate Commission had issued was a Creditor to the Amount of £5000, and it was urged that as he would not be entitled to vote in the Choice of Assignees under the joint Commission, the Court would consider his Interest as against superseding his Commission.

*Mr. Leach*, in Support of the Petition.

*Sir Samuel Romilly* and *Mr. Cooke*, *contra*.

Court so interfering; and it is not a sufficient Reason, that by such Interference a separate Creditor to a great Amount will be divested of his Right of voting in the Choice of Assignees.

Where a separate Commission is superseded, to give Effect to an Arrangement of this Nature, the Petitioning Creditor is to be reimbursed his Costs out of the joint Estate.

*The*

*The Lord* CHANCELLOR.

The Existence of a prior separate Commission makes a subsequent joint Commission a Nullity; but on Principles of Convenience, this Court will supersede the separate Commission, unless there be some strong Objection against superseding it. In none of the Applications for this Purpose has the Circumstance, that a separate Creditor to a large Amount may be excluded from voting in the Choice of Assignees, been considered as a sufficient Objection against superseding the separate Commission. When a separate Commission, having Priority, is superseded to effect a subsequent joint one, the petitioning Creditor must have his Costs.

Let the separate Commission be superseded with Costs out of the joint Estate.

1814.

*Ex parte*  
PACHELOR.

*Ex parte* MALKIN.—In the Matter of ADAMS.

LINCOLN'S  
INN HALL.  
Aug. 1812.

**T**HIS was a Petition to supersede a Commission, under which *Samuel Thomas Adams*, an Attorney and Solicitor, had been found a Bankrupt as a Scrivener. A Scrivener within the Bankrupt Laws is one who,

with an Intention thereby to get a Living, receives into his Custody other Men's Money, to be laid out on their Account, according to the Purpose for which it is deposited. The Mode of his Remuneration, whether by Procuration Fees, by a Charge for Commission, or otherwise, is a Circumstance immaterial. The actual Deposit of, and complete Control over the Money of others till invested, and the Intention thereby to get a Living, being the Essence of this Species of Trading.

A Creditor of the Bankrupt is not a competent Witness to sustain a Commission upon an Issue directed to try its Validity.

The Party who has to sustain the Affirmative is to be Plaintiff in an Issue, and, as such, has the Choice of the Court in which it is to be tried.

*The*



1812.

*The Lord CHANCELLOR,*

*Ex parte*  
**MALKIN.**—In  
 the Matter of  
**ADAMS.**

With the Intimation of his Opinion already stated in Vol. I. of these Cases, page 406 (a), directed an Issue, whether *Adams* was a Scrivener or Broker, within the several Statutes relating to Bankrupts, some or one of them.

March 2,  
 1814.

**MALKIN v. ADAMS.**

See the Mar-  
 gin of the pre-  
 ceding Case.

**T**HE Issue directed upon the above Petition was this Day tried in the *Common Pleas*, before *Gibbs*, C. J. and a Special Jury.

The Evidence in Substance was, that the Bankrupt was an Attorney and Solicitor; that he was in the Habit of being applied to to negotiate Money Transactions, and did in many Instances negotiate them: viz. *Adams* and Son, the Petitioning Creditors, having no Account with a Banker, were accustomed to lodge their Cash and Bills with the Bankrupt, which were paid by him into his Bankers; that Applications were occasionally made to the Bankrupt to procure Loans upon Mortgages, Annuities, and other Securities; that he occasionally had negotiated the Purchases and Sales of Freehold and Leasehold Property; that he received the Rents of some Houses, of which the Sale did not take Place; and that in one or two Instances, Part of the Purchase Money being left upon Mortgage, he from Time to Time received the Interest upon it; and that in some Instances, where he effected Loans or Purchases, the Money was given to him to take to the Person for whose Use it was procured, or to whom it was to be paid; and under

(a) 2 *Ves. & Beames*, 31, 175.

those

those Circumstances was sometimes for a few Days remaining in his Hands, or at his Bankers: that he, in some of these Transactions, had made a Charge as for Commission, and in others for Attendances, and for drawing and preparing the Deeds and Securities.

1814.  
MALKIN v.  
ADAMS.

It is unnecessary to go into a particular Detail of the Evidence, which was very long, and occupied much Time in the Investigation, the above being fully sufficient for understanding the View of this Case taken by the Chief Justice in his Direction to the Jury.

*Gibbs, C. J.*, directed the Jury as follows:

The Question for your Consideration upon this Case is, whether *Samuel Thomas Adams* was, at the Date and suing forth of the Commission against him, a Money Scrivener within the Intent and Meaning of the Bankrupt Laws. The Difficulty of arriving at a correct Conclusion upon this Question arises from the Circumstance, that there is now no living Character engaged in that Occupation, from whom the Nature of it can be ascertained. As a distinct Trade, it has been for some Time discontinued; it has severed itself into various Branches; the formerly familiar Habits of it have disappeared; and from the Books alone we are now with Difficulty enabled correctly to ascertain the Character of its Existence.

The Statute of *Elizabeth* comprehended all Trading generally within its Operation. Between the Enactment of that Statute and the Statute of *James*(a), it was at least doubtful whether or not a Scrivener was within the general Comprehension of the former Statute. To remove that Doubt, the Statute of *James* declared, that all and every Person or Persons, that shall use the Trade or

(a) 21 Jac. 1. c. 19. s. 2.

1814.  
  
 MALKIN v.  
 ADAMS.

Profession of a Scrivener, receiving other Men's Monies or Estates into his Trust or Custody, shall be accounted and adjudged a Bankrupt to all Intents and Purposes. Within that Declaration, it would be necessary that he should carry on a Trade or Profession as an Occupation, exercised with a View to gain a Living, open to those who thought fit to resort to him in the Exercise of it, and in such Exercise of it receiving into his Trust and Custody other Men's Monies or Estates. Before the Establishment of Bankers, as a distinct Occupation, Deposits were made with the Scrivener, to be employed in advantageous Purchases and Speculations, but confiding to him, in the mean Time, the Use of and the Control over the Money, not in the Nature of Money numbered and specifically reclaimable, but generally, and to be blended with his own, and to be invested when the Occasion for which it was destined should present itself.

The Legislature deemed it of great Importance, that this Description of Traders should be made subject to the Bankrupt Law. He was trusted with other Men's Property in the Habits of, at that Time, a notorious and extensive Dealing, and the public Protection required, in the Event of his Insolvency, the speedy and equalizing Remedy of the Bankrupt Laws. Since that Time the Business has almost ceased. *Jack Ellis* is mentioned, in *Boswell's Life of Johnson*, as the last Person who exercised it. It has now been partially adopted by the Banker and partially by the Attorney; and as the Banker would not become an Attorney, by filling up occasionally a Bond, neither can an Attorney be considered as a Banker or Money Scrivener from an occasional Deposit of Money with him. In my View of the Case, he must be trusted with the Money to be laid out as Occasion may require. It is not his being sent with the Money from the Lender to the Borrower, nor receiving the Money

Money contracted to be lent on one Side, and borrowed on the other, in Order to pay it over to the Person borrowing. The Circumstance of Money passing and repassing through his Hands does not constitute this Species of Trading. There must be a depositing of other Men's Monies and Estates, by which I do not mean Money deposited upon one or two Occasions merely, nor what he may sometimes incidentally or accidentally have received, in Order to seek a Borrower for it, but a general Habit or Intention so to get his Living. This cannot be better expressed than in the Language of the Lord Chancellor, in the Case of *Ex parte Patterson*. "The Trading of a Scrivener does not depend upon the Fact, whether the Bankrupt has or has not occasionally done Acts, which a Scrivener would have properly done, not upon what he might have done in one Day, and what upon another, but generally upon his Intention of getting a Living by so doing" (a). Adopting this, I shall observe, although he may, as an Attorney, incidentally have acted as a Scrivener, that will not constitute him a Scrivener within the Bankrupt Laws. Having thus stated to you my View of the Nature of this Trading, I will now state the Facts. [His Lordship here went through the Facts as stated in Evidence.] The same Observation applies to all of them. They appear to me to constitute nothing more than the ordinary Business of an Attorney. No Trust of Money to be laid out, no Control over Money, no actual Deposit leaving the Money at his Discretion till a Borrower was found for it, except that he was sometimes the Hand to pay over the Fund from one Person to another.

1814.  
MALKIN v.  
ADAMS.

An Observation of my Brother *Best's* is not immaterial, namely, that the Charges in his Bill are the Charges of an Attorney. My Conclusion, however, does not pro-

(a) 1 *Rose's Cases*, 405.

1814.  
 MALKIN v.  
 ADAMS.

ceed upon that Ground. I am of Opinion that, even if he charged in his Bill as for Procuration or Commission, that is not enough, unless he had been actually entrusted with the Money as Money Scriveners formerly were; and I think also, that if he was so entrusted, it matters not what Form of Charge he adopted for his Remuneration.

It is for you, under these Facts, to consider whether you will find for the Plaintiffs or Defendants.

The Jury found for the Defendants.

The *Solicitor-General, Onslow, Serjeant, Richardson, and Rose*, for the Plaintiffs.

*Best and Vaughan, Serjeants, and Campbell*, for the Defendants.

In the Course of the Trial of the above Issue, a Creditor who had not proved under the Commission was tendered as a Witness for the Plaintiffs, and rejected.

It was contended that this being merely the Trial of an Issue, involving no Demand of Property to the Increase of the Bankrupt's Estate, a Creditor had no Interest which ought to render him incompetent.

*Gibbs, C. J.*, dissented from the Distinction, and held that the Interest which a Creditor had in the Right to resort to the Distribution of the Bankrupt's Property, under a Commission, was as well upon the Trial of an Issue, as in an Action by the Assignee to recover the Property of the Bankrupt, fatal to his Competency (*a*).

(*a*) *Ex parte Osborn, 1 Rose, 387. 392.*

The

The Petition was now brought on again before the Lord *Chancellor*, to obtain an Order for superseding the Commission, which was accordingly ordered to be superseded (a).

LINCOLN'S  
INN HALL,  
Aug. 1814.  
MALKIN v.  
ADAMS.

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*Note.*—The Petitioners were Creditors, who had proved under the Commission. The Lord *Chancellor* was of Opinion, that a Creditor who had proved, was not, when he made the Application, *bond fide*, and upon an early Discovery of the Invalidity of a Commission, precluded from applying to the great Seal to supersede it (b).

In directing an Issue, his Lordship declared the Practice to be, that those who had to sustain the Affirmative were to be Plaintiffs, and the Plaintiffs to have the Choice of the Court in which to try it.

(a) *Vide* Vol. I. p. 406. 2 v. *Malkin* and another; and *Vs. Beames*, 31. 175. 3 *Camp.* an Enquiry into the Nature Rep. 534. *Hurd's* Report, of of the Trading as a Scrivener. the Case. *Adams* and others (b) *Ex parte Bonsor*, post.

LINCOLN'S  
INN HALL.

*Ex parte* LIDDEL.—In the Matter of DE PRADO.

*A.* holding the Acceptance of *B.*, which he had taken in Ignorance that *B.* was a Member of the Firm of *C.* and *Co.*, the Drawers, and of which Firm one of the Members was an Infant, proves a Debt against the joint Estates, under the separate Commissions against *B.* and *C.* (the Infancy of the other Partner excluding a joint Commission) making his Proof, not as against the Liability of the Parties, arising from the Contract on the Bill, but upon his Right to include or exclude the Resort to a dormant Partner.

*HITCHCOCK*, *Groves*, and *De Prado* were Traders at *Hull*, under the Firm of *Peter Groves* and *Co.* *De Prado* resided in *London*. *Groves* was a Minor. *Keys* had sold Goods to *Peter Groves* and *Co.*, to be paid for by an approved Acceptance. *Peter Groves* and *Co.* gave him the Bill of *Peter Groves* and *Co.*, drawn upon and accepted by *De Prado*, in *London*. *Keys* received it in Ignorance that *De Prado* was one of the Firm of the Drawers. The Firm became bankrupt; but *Groves* being privileged by his Infancy, a joint Commission would have been ineffectual: Separate Commissions therefore issued against *De Prado* and against *Hitchcock*.

In *Hitchcock's* Bankruptcy an Order was made for keeping distinct Accounts of the joint and separate Estate. *Keys* took Advantage of that Order: and insisting upon a Demand against the joint Estate, not by Force of the Contract upon the Bill, in which *Groves* the Infant was comprehended, but of the Contract by Operation of Law, either including or rejecting a dormant Partner; he, under *Hitchcock's* Commission, proved as

joint Commission) making his Proof, not as against the Liability of the Parties, arising from the Contract on the Bill, but upon his Right to include or exclude the Resort to a dormant Partner.

Held, that such Mode of Proof was a conclusive Election to resort to the joint Funds alone, and discharged the separate Estate of the Acceptor from the Liability which would otherwise have arisen out of the Ignorance of the Holder that the Acceptor was a Member of the Firm of the Drawers.

a joint

a joint Creditor, and received a Dividend out of the joint Effects.

1814.

*Ex parte*

LIDDEL.—

In the Matter of  
DE PRADO.

An Application was afterwards made in *De Prado's* Bankruptcy, to have the joint Property, which his Assignees had also possessed themselves of, distributed among the joint Creditors, and an Order was made accordingly.

Of that Order also *Keys* availed himself, and still insisting, not upon the Debt created by the Bill, but upon the Contract attaching by Operation of Law, against visible and dormant Partners, he received a Dividend upon his Debt as a joint Creditor, under the Bankruptcy against *De Prado*.

Standing in this Situation, with a Proof in Respect of his legal Right against dormant and visible Partners, established against the joint Estate and Dividends received upon it in both Bankruptcies, *Keys* endeavoured to avail himself, as against *De Prado's* separate Estate, of a Right to prove upon his Liability as Acceptor of the Bill. The Commissioners deeming him, upon the Ignorance of the Partnership under which the Bill had been taken, to be within the Cases regulating such Proof, accordingly admitted it.

The Assignees of *De Prado* preferred the present Petition, praying that the Proof might be expunged.

Mr. *Hart* and Mr. *Montague* supported the Petition. *Ex parte Bevan* (a).

Mr. *Wetherell* opposed it, upon the Authority of *Ex parte Bonbonus*, *Ex parte La Forte*, *Cooke's B. L.* 266.

(a) 10 *Ves.* 107. viz. That Estates; but must elect: and a joint and several Creditor having elected, is concluded. cannot prove against both



1814.

*The Lord CHANCELLOR.**See ex. p. Adam - 1123427**Ex parte*LIDDEL.—  
In the Matter of  
DE PRADO.

The Holder of this Bill of Exchange, modelling his Proof upon the Right which the Law gave him, either of confining his Claim to the visible Members of a Partnership, or of extending it to the dormant, has made a deliberate, and, I think, a conclusive Election. Adopting the aggregate Liability of all his Debtors, he is excluded now from resorting to them individually.

Ordered as prayed.

See the next Cases.

LINCOLN'S

INN HALL,

Aug. 1813.

*Ex parte ADAM.*—In the Matter of COOKE (a).

A Holder of a Bill of Exchange, drawn by a Firm upon some of their Members constituting a distinct Firm, has a Right to prove it against all the Parties,

according to their Liabilities upon the Bill, provided he was ignorant of their Partnership.

**F**IVE Persons trading together under the Firm of *Cooke and Co.*, drew a Bill of Exchange on two of the Members of their Copartnership, who carried on a distinct Trade as *Harrison and Goss*. The Bill was accepted, negotiated, and in the Course of Circulation came into the Hands of the Petitioner, without any Knowledge, on his Part, of the Connexion between the Parties: he therefore contended that he had a Right of Proof, both against the Drawers and Acceptors.

Mr. *Leach* and Mr. *Agar*, in Support of the Petition, cited *Ex parte La Foret*, *Ex parte Bonbonus*, *Cooke's* B. L. 266.

Sir *Samuel Romilly*, and Mr. *Montague contra*, relied on *Ex parte Bevan* and *Ex parte Liddel*, MS. the preceding Case.

(a) 1 *Ves. & Beames*, 493. Vol. I. p. 441, of these Cases.*The*

*The Lord* CHANCELLOR,

Observing that the Case of *Ex parte Liddell* was singular in its Circumstances, and inoperative upon the present, was of Opinion that the Petitioner, as ignorant of the Connexion of the Parties, was entitled to prove against both Estates.

1813.

*Ex parte*

ADAM.—

In the Matter of  
COOKE.

Ordered.

See the next Case.

*Ex parte* BIGG.—In the Matter of HARRISON.

LINCOLN'S

INN HALL,

Feb. 1814.

*SAMUEL* Cooke drew a Bill of Exchange upon *Harrison* and Co., which they accepted. The Firm of *Harrison* and Co. consisted of *Cooke* himself and four others; they became bankrupt.

See the marginal Abstract of the preceding Case. Such Proof not to be admitted where the Holder was aware of the Identity of the Parties.

The Holders, who were Bankers with whom *Cooke* kept his private Account, and had discounted the Bill, proved it under the Commission against the joint Estate, in Respect of the Acceptance; and now sought to establish an additional Proof against the separate Estate of the Drawer.

*Cooke* was not a distinct Trader.—The Objection to this Application was, that at the Time of taking the Bill, the Holders were not ignorant that *Cooke* was included in *Harrison* and Co. *Ex parte La Foret*, *Ex parte Bonbonus* (a), *Ex parte Walker* (b). On the other Hand, the Circumstance was urged that the Holders had no Dealing with *Harrison* and Co., but with *Cooke*, as an Individual; and *Ex parte Adam* was cited.

Mr. Roupell, in Support of the Petition.

(a) *Cooke's B. L.* 251.

(b) Vol. I. p. 441.

Sir

1814.

Sir Samuel Romilly and Mr. Montague, *contra*.*Ex parte*

BIGG.—

*The Lord CHANCELLOR.*In the Matter of  
HARRISON.

Where the Object appears to be to give the Bill a Character of Respectability by such Distribution of the Names of a Partnership, the Court has said that the Parties to such an Arrangement shall not avail themselves of it, against their Knowledge of the Method in which the Obligation of the Firm ought regularly to be created. There is Nothing that seems to me to bring this within the Principle of the Cases collected by Mr. Cooke, or of the Distinction which I recognized in *Ex parte Walker (a)*. In all the antecedent Cases the Individuals had subdivided themselves into distinct Partnerships; there was a recognized Stock, against which the Credit was to operate. In none of them was the Person against whose Estate the second Proof was permitted to attach, identified in his Character as a Trader with the Partnership of which he was a Member.

(a) Vol. I. p. 440.

LINCOLN'S  
INN HALL,  
March 8,  
1814.

*Ex parte GIBBS.*—In the Matter of GIBBS.

A Farmer buying and selling Horses to an Extent unauthorised by his Character of Farmer may be a Bankrupt as a Horse-dealer, although he may have so bought and sold without License to deal in Horses.

**T**HE Bankrupt petitioned to supersede his Commission, upon an Objection to the Trading, viz. as a Dealer in Horses. He was a Farmer, and contended that the various Instances of buying and selling Horses, which had been adduced as Evidence of Trading, had occurred strictly within the Limits of his Occupation as a Farmer. He was not licensed as a Horse-dealer.

*The*

*The Lord CHANCELLOR.*

A Farmer is expressly exempted from the Operation of the Bankrupt Law, but if he adds to that Character a Dealing in Horses, whether licensed or not, he may be made a Bankrupt. The Question therefore is, whether there has been, in this Case, more of Horse-dealing than can be fairly considered to be incidental to his Farming. I cannot decide that upon these contradictory Affidavits: it is a Question for a Jury. Let the Assignees admit they are in Possession of some Part of the Bankrupt's Property, and let him bring an Action.

1814.

*Ex parte*

GIBBS.—

In the Matter of

GIBBS.

WRIGHT v. BIRD.

1st Price's Exch. Rep. 20.

Upon Trover by the Assignees, the Question was as to the Trading. The Bankrupt had always been a Farmer; but shortly before the Bankruptcy bought Horses unfit for Farming, and resold them: he declared his Intention to become a Horse-dealer, and take out a Licence, and hired a Person as his horse-dealing Man.

Wood, B. directed the Jury that a Farmer, as such, was not subject

to the Bankrupt Laws; but that if he bought Horses with a View to profit by their Sale, as a Part of his Means of gaining a Livelihood, he had rendered himself liable They found for the Defendant. A Rule having been obtained for a new Trial,

Thompson, C. B. The Extent of the Dealing is not material, provided the Party sets up as an avowed Trader.

May 13.

S. P. But the Court granted a new Trial against the Finding of the Jury on the Facts!

Rule absolute.

*Ex parte*

LINCOLN'S  
INN HALL,  
August, 1813.  
Trinity Term,  
1814.

*Ex parte* YOUNG.—In the Matter of SLANEY.

The Proof of two solvent Partners admitted under the Bankruptcy of the Third, for a Debt, which by an unauthorized Use of the Partnership Name he had created against the Firm, and which, after the Bankruptcy, they were compelled to discharge.

*Note.*—All the Debts of the Partnership had been discharged.

The Words "Person liable," in the Stat. 49 Geo. III. c. 121. s. 8. devolved upon *Slaney*, who principally acted in the Management of the Business.

persons rendering themselves responsible for the Debt of another: *e. g.* an Acceptor of a Bill for the Accommodation of the Drawer.

**T**HIS was the Petition of the Assignees of the Bankrupt, praying that a Proof of £22,110 : 16s. : 10d. which had been admitted under this Commission against *Slaney*, might be expunged.

*Thomas Botfield, William Botfield, and M. A. Slaney*, on the 25th Day of November, 1807, agreed to become Copartners as Bankers, at *Shiffnall*, under the Firm of *Botfield, Slaney, and Botfield*, for a Term of twenty-one Years; Profit and Loss to be equally divided between and borne by the Parties.

The Articles of Copartnership provided, that the Bills, Notes, &c. should be signed by one of the Partners, and that none of the Parties should appropriate to his own Use any Part of the Partnership Funds, without the previous Consent of the Rest, inscribed in the order Book.

*Botfield, Slaney, and Botfield*, accordingly commenced the copartnership Business on the first Day of January, 1808, and issued one Pound and five Pounds provincial Notes, and received Deposits of Money in their Bank, in the usual and customary Mode of Country Bankers; and although the other Partners occasionally signed the Notes which were issued, yet that Duty for the most Part devolved upon *Slaney*, who principally acted in the Management of the Business.

the

On *January 25th*, 1811, *Slaney* went to *London*, as he was frequently in the Habit of doing; on Business, and after remaining a few Days there, absconded to *America*. The Commission was issued on the 14th of *March* following.

1814.

*Ex parte*  
YOUNG.—In  
the Matter  
of SLANEY.

On *January 21*, 1811, all the Accounts of the Concern had been settled up to the 1st of *January* preceding, without any Suspicion on the Part of the *Botfields* of *Slaney's* Intention to abscond, or that any Thing was wrong: *Slaney's* separate Account shewing a Balance of £322: 0s. : 5d. in his Favour.

After the Bankruptcy, however, and upon a stricter Examination of the Accounts, the *Botfields* were enabled to discover that *Slaney*, by pledging the Credit and using the Notes and Name of the Partnership, had established against it, in actual Debt and Liability, the Sum of £22,110: 16s. : 10d. This they were admitted to prove under the Commission, as the Amount of sundry Sums taken by the said *M. A. Slaney* out of, or obtained from, the said Copartnership Concern, without the Knowledge or Consent of the said *Thomas Botfield* and *William Botfield*, and which they, the said *Thomas Botfield* and *William Botfield*, had given Securities for, or paid the Amount of. The Particulars of the said Sum of £22,110 16s. 10d. were stated in the Affidavit of the said *Thomas Botfield* and *William Botfield*, before the said Commissioners, to be set forth in the Schedule thereto annexed.

The Schedules were inserted in the Petition, and stated different Notes, Bills, &c. to the above Amount, drawn by *Slaney* in the Partnership Name, and paid away by him for his private Purposes.

The Petition insisted that this Proof ought to be expunged,

1814.  
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*Ex parte*  
 YOUNG.—In  
 the Matter  
 of SLANEY.

punged, the Bills having been drawn by *Slaney*, the Person entrusted and empowered to draw the Bills, and manage the Cash Concerns of the Copartnership, at a Time when he was openly engaged in those Concerns, and having been issued in the Course of Business, and taken by the Parties to whose Order they were drawn, upon the Credit of the Copartnership.

That in Respect of the Bills (*a*) which had been discounted by *Slaney*, with the Cash Notes of the Copartnership, he had charged the regular and usual Discount, Commission, and Banker's Charges, in the Account of the Partnership Concern of *Botfield, Slaney*, and *Botfield*; or they were at least paid to, or deducted by him, as and for such Discount, Commission, and Banker's Charge, to and for the Use of the Partnership Concern: and as the Discount was done in the usual Course of Business, and the Firm of *Botfield, Slaney*, and *Botfield*, became legally intitled to such Discount, Commission, and Banker's Charges, against the Parties discounting the Bills at their Bank, or with *Slaney* their acting Partner, and also to recover upon the said Bills against the Drawers, Acceptors, and Indorsees of the Bills so discounted.

That the Credit given to *Slaney* was given to him very much in Consequence of his Connexion with *Thomas Botfield* and *William Botfield*; and if they should be allowed to retain the Proof of their Debt of £22,110: 16s.: 10d. all the innocent Creditors of *Slaney*, who trusted him through the Credit of *Thomas Botfield* and *William Botfield*, would be materially injured.

(*a*) Bills discounted by of the Firm, and appropriated *Slaney*, with the Cash Notes to his own Use.

Subsequent

Subsequent to the Bankruptcy, all the Partnership Debts had been paid or provided for by the *Botfields*.

1814.

*Ex parte*

YOUNG.—In  
the Matter  
of SLANEY.

Mr. *Richards*, Mr. *Leach*, and Mr. *Montague*, in Support of the Petition, argued it upon the Grounds already stated. They insisted that the Payment of the Partnership Debts, *after* the Bankruptcy, could not throw a Burthen upon the Estate, which did not exist *at* the Bankruptcy: that the *Botfields* could not prove in Competition with the separate Creditors of one of their own Partners: and that they were not assisted by the Stat. 49 Geo. III. c. 121. s. 8. They cited *Ex parte Reeve* (a). *Ex parte Broome* (b).

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Bell*, *contra*, argued it upon the strong moral Justice of the Claim, and as influenced by the Cases, *Ex parte Hesham* (c), *Ex parte Adams* (d), *Ex parte King* (e), *Ex parte Harris* (f), *Wood v. Dodgson* (g), and as comprehended in Stat. 49 Geo. III. c. 121. s. 8.

*The Lord CHANCELLOR.*

June 29.

I am anxious to say a few Words in Explanation of the Principle, upon which the Order I have already intimated my Intention of pronouncing in this Case is founded. The Petition consists of a long Statement of Circumstances, amounting to a Result, not precisely, but in Effect, as follows:—The two *Botfields* and *Slaney* were in Partnership; and to the latter, in a very considerable Degree, was committed the Management of the Business: but although it may be said to have been in a very consi-

(a) 9 *Ves.* 588.

(e) Vol. I. p. 212. 17 *Ves.* 115.

(b) Vol. I. p. 69.

(f) Vol. I. 129. 437.

(c) *Ibid.* 146.

(g) Next Case.

(d) *Ibid.* 305.

derable



1814.

*Ex parte*YOUNG.—In  
the Matter  
of SLANEY.

derable Degree committed to his Management, it certainly was not so to an Extent authorising him to act in it as he has done. Various Sums, in the whole amounting to £22,000, were by him abstracted from the Partnership Funds, without any Entry made, or Notice taken of them, in the Books of the Partnership, and undiscovered till after the Bankruptcy. All the Partnership Debts have since been paid by the solvent Partners.

If *all* the Parties had become bankrupt, although the Authorities have differed very much, the Principle which would have regulated the Proof between their respective Estates is now clearly established. I should very reluctantly intrench upon it. Nothing can be more inconvenient to those who are to guide themselves by the Decisions of Courts of Justice, than conflicting Principles of Decision. The Law of this Court at one Time certainly was (a), that if the Debt raised by the Partners against an individual Partner, *et vice versa*, arose out of Contract, the Proof might be admitted: but in the Case of *Lodge v. Fendal* (b), if not earlier, Lord *Thurlow* receded from that Opinion, and thought that if the Claim arose out of Contract, the Estates should be administered jointly and separately, as they were actually constituted at the Time of the Bankruptcy. On the other Hand, it has been decided and understood, from *Forsyth's* Case down to the present, that where the Debt does not arise out of Contract, but out of a fraudulent Breach of the Obligations existing between the Partners, there the Funds so subtracted shall be considered as detached from the general Partnership Balance, and as a distinct Debt from one Estate to the other. In the Choice of these opposite Principles and Decisions, it is better to adopt that which

(a) So decided by Lord *Cooke's* B. C. 560.

*Talbot, C. Ex parte Blake.* (b) *Ibid.* 561.

imposes

imposes upon the Parties the Sanction of strictly adhering to their Engagements with each other.

1814.

*Ex parte*

YOUNG.—In  
the Matter  
of SLANEY.

I have no Doubt, therefore, under the Circumstances of this Case, if all these Parties had been bankrupt, a Proof ought to be admitted by the Creditors of the Partnership against the separate Estate of *Slaney*. It is true indeed, that the Partnership Estate comprises the *Botfields*, and that very *Slaney*, who by this Arrangement would be in Fact proving against himself. But Individuals are not unfrequently permitted to prove, who, strictly speaking, have neither a legal nor equitable Title to do so, further than they are the Means of giving Effect to the Rights of those who have. Then, does the Case of two of the Partners being solvent make any Difference? It has been objected that the Proof cannot be admitted, because thereby the *Botfields* are admitted to prove, in Competition with their own Creditors. In the Case as it now stands, there is no such Competition; all the Partnership Creditors have been paid; and although they have been paid after the Bankruptcy, yet the Effect is the same: The Proof will not be in Competition with them. *Slaney's* Estate, it has been insisted, must, by the Rules in Bankruptcy, go exclusively to his separate Creditors; but in every fair and equitable Understanding of the respective Situations of the Parties, are not the *Botfields* to be considered as his separate Creditors? In Bankruptcy, the Administration of the Estate is both legal and equitable. Prior to the Bankruptcy, the *Botfields* might have filed their Bill to compel *Slaney* to pay that Money which he had so misapplied; and how is that Equity shaken by the Bankruptcy? Although the two *Botfields*, impeded by the technical Form of legal Proceeding, could not have maintained an Action against *Slaney*; yet undoubtedly, upon equitable Principles, *Slaney* was a Trustee for, and accountable to them; and a Court of Equity

1814.

*Ex parte*  
YOUNG.—In  
the Matter  
of SLANEY.

Equity would have taken Care to modify its equitable Remedy, unshackled by the formal Impediments of Law. The Bankruptcy, embracing equitable as well as legal Principles, leaves that Remedy unaffected.

If it were necessary, however, to seek in the Act of Parliament (a) any Support to the moral Justice of this Case, the Act of Parliament would supply it. If it has been decided that the Section in Question is applicable strictly to *Sureties*, the two *Botfields* are certainly not strictly *Sureties*. But the other Words, "Persons liable," were adopted for the convenient Latitude of comprehending all those who could not be strictly considered as *Sureties*, and yet might meet the Protection they were entitled to under those general Words. The Acceptor of a Bill of Exchange is not strictly a *Surety* for the Drawer; the Acceptor is the Person liable in Respect of his own Engagement: but if the Debt which the Acceptance adopts be the Debt of the Drawer, if the Contract between the Drawer and Acceptor be, as in an Accommodation Transaction, that the Drawer should be the Person responsible, though the Acceptor would not strictly be a *Surety*, yet he is "a Person liable." In Cases of this Kind, you must look to all the Circumstances; and if the Circumstances place the Party in the Situation of a Person liable, he is entitled to the Relief provided by that extensive Denomination.

Upon the whole, I am of Opinion, that the plain moral Justice of this Case is not opposed by legal Principles, and that this Proof ought not therefore to be expunged.

Petition dismissed with Costs out of the Estate.

(a) 49 Geo. III. c. 121. s. 8.

KING'S  
BENCH,  
*Michaelmas*  
*Term, 1813.*

WOOD *v.* DODGSON.

**T**HE Plaintiff declared in Covenant, and stated an Indenture, bearing Date *May* 6th, 1811, made upon a Dissolution of Partnership, which had subsisted between him and the Defendant for the seven Years preceding. The Indenture recited an Agreement to determine the Partnership; that *Wood* should assign over to *Dodgson* all Cash, Stock, Debts, &c. &c. belonging to the Partnership, in Consideration of £300 to be paid by the latter, within six Months from the 3d Day of *January* then last; that *Dodgson* should indemnify *Wood* against all the Debts and Engagements of the Copartnership. It was witnessed, that *Wood* and *Dodgson* did dissolve their Partnership, and *Wood* assigned the Stock in Trade, &c. to *Dodgson*: and then the Covenant upon which the Declaration proceeded was as follows. The said *Thomas Dodgson* did thereby promise, covenant, and agree, to and with the said *John Wood*, that he the said *Thomas* should and would well and truly pay, satisfy, and discharge all Debts whatsoever, owing in Respect of the said Copartnership: and should and would well and truly save, defend, keep harmless, and indemnify the said *John Wood*, his, &c. of, from, and against the Payment or Satisfaction of all and singular the Debts then due and owing, for or

A Partner continuing the Business, took an Assignment of all the Stock, &c. and covenanted to indemnify the retiring Partner from the Debts then owing from the Partnership. The continuing Partner became Bankrupt, and obtained his Certificate; and subsequently an Action was commenced against the retiring Partner, upon an

Acceptance of the Partnership. Judgment was obtained against him, and he paid the Debt and Costs. Held, that no Action would lie against the Bankrupt upon the Covenant, since under 49 *Geo. III. c. 121. s. 8*, the retiring Partner might, on his Liability, have resorted to and proved his Debt under the Commission, and was therefore barred by the Certificate.

1813.  
 WOOD v.  
 DODGSON.

in Respect of the said Copartnership ; and also of, from, and against all and all Manner of Action and Actions, Suit and Suits, Cause and Causes of Actions and Suit, Costs, Charges, &c. &c. whatsoever, which should or might be recovered against, or sustained, expended, become payable, or accrue to the said *John Wood*, his, &c. for or by Reason or Means of the Non-payment of the same Debts or any of them ; or for or by Reason or Means of his Name being made Use of in any Action or Actions, Suit or Suits, or other Proceedings whatsoever, which should or might at any Time thereafter be had, made, brought, or prosecuted, for the Recovery of any Debt or Sum of Money to them or any of them due and owing.

The Breach assigned was, that the Defendant had not paid the Debts of the Partnership, and had not indemnified the Plaintiff. For, that on *February* 16, 1813, an Action was commenced against the Plaintiff in the Court of *King's Bench*, at the Suit of one *Alexander Wylie*, upon a Bill of Exchange dated at *Glasgow*, *July* 4, 1810, drawn by the said *Alexander*, before the making of the said Indenture, upon and accepted by the said Defendant and Plaintiff, for £155, payable to the Order of the said *Alexander*, six Months after Date ; which Bill was accepted by them for a Debt, before the making of the said Indenture, due and owing from them : and such Proceedings were afterwards had thereupon, that on *April* 13, 1813, the Plaintiff was obliged to pay to the said *Alexander*, £221 : 18s : 6d. in Satisfaction of said Bill, and for Interest and Costs. It then stated, Defendant's Refusal to repay, according to his Covenant, to Plaintiff's Damage of £250.

To this the Defendant pleaded, First, *Non est factum* ; Second, That he had paid and satisfied all the Debts, and kept the Plaintiff indemnified, and that he was not damaged

fied in Manner and Form ; Thirdly, That Plaintiff had not since the making of the said supposed Indenture been damnified by Reason of any Thing in the said Indenture mentioned ; Fourthly, That after the making of the said Indenture, to wit, on *April 15*, 1812, Defendant became a Bankrupt, and the supposed Cause of Action accrued before his Bankruptcy; Fifthly, Bankruptcy and Certificate specially, and that the said Indenture was made and entered into before the said 15th of *April*, and that although Plaintiff did pay the said Sum of £221 : 18s : 6d. to the said *Alexander Wylie*, after the said 15th of *April*, when the Defendant so became a Bankrupt, and the said Commission was so awarded, yet that immediately from and after the said Payment, the Plaintiff was enabled to prove and might have proved the said £221 : 18s : 6d., under the said Commission against Defendant, without disturbing any Dividend or Dividends already made under the same.

1813.  
~  
WOOD v.  
DODGSON.

On the first four Pleas, there was an Issue, and to the last, a Demurrer and Joinder in Demurrer, which was argued by

*Scarlett*, for the Plaintiff.

*Abbot*, for the Defendant.

The Court were of Opinion, that the Debt was a Debt which by 49 *Geo. III. c. 121. s. 8. (a)* might have been proved under the Commission, and that the Certificate was a Bar.

Judgment for the Defendant.

(a) *Vide Ex parte Young*, p. 40.

## ROBSON and Another, Assignees, &amp;c. v. ———

A Reference  
to Arbitra-  
tion of all  
Matters in  
Dispute by  
Assignees of  
a Bankrupt,  
and a conse-  
quent Award  
to pay a Sum  
of Money, is  
conclusive  
upon them  
as to Assets.

**T**HE Plaintiffs moved, that so much of an Award as directed the Payment by them of a Sum of Money and the Costs of the Reference, might be set aside; upon the Ground that their Bankrupt's Estate and Effects were exhausted.

It was a Bill filed for a specific Performance of an Agreement. Upon the Bankruptcy of the original Plaintiff, the Assignees adopted the Suit and filed a supplemental Bill. A specific Performance was decreed; and then all Matters in Dispute were referred to Arbitration: the Parties respectively binding themselves to the Performance of the Award.

It was contended that the Plaintiffs, as Assignees, ought not to be personally charged with the Payment of the Money in Question, unless there had been a special Undertaking to that Effect, or unless they had been guilty of Misconduct, which in this Case was not imputed to them.

Sir *Samuel Romilly* and Mr. *Shadwell* supported the Motion.

Mr. *Richards* and Mr. *Wingfield* opposed it, upon the Analogy to the Case of an Executor or an Administrator.

*The Lord CHANCELLOR.*

If an Executor (*a*) or Administrator think fit to refer

(*a*) 1 T. R. 691. 5 T. R. 7. 7 T. R. 453.

generally

generally all Matters in Dispute to Arbitration, without protesting against the Reference being taken as an Admission of Assets, it will amount to such an Admission. I see no Distinction in the Case of an Assignee of a Bankrupt.

1813.  
ROBSON and  
Another, As-  
signees, &c.  
v. —

Motion refused.

*Ex parte* CAMPBELL.—In the Matter of  
BROMER.

LINCOLN'S  
INN HALL,  
March 11, 1814.

UPON a Petition to expunge, upon the Ground of Usury, a Debt of £32,000, which *Clay* had proved against *Bromer's* Estate, a Question arose, whether the Depositions of *Bromer* upon an Examination, taken not by the Commissioners in his own Bankruptcy, but under another Commission against *Paton* and *Gill*, could be admitted as Evidence against *Clay*. *Bromer* was since dead, and had not been examined in his own Bankruptcy.

The Exami-  
nation of a  
Bankrupt,  
taken, not in  
his own  
Bankruptcy,  
but under  
another  
Commission,  
is not, upon

*Mr. Hart* and *Mr. Montague* contended that it was not Evidence; every Principle was against it: it had been taken in the Absence of the Party sought to be affected by it, under a Bankruptcy in which he had no Interest, where he had no Right to be present, and could not have an Opportunity of cross-examining or in any Way counteracting the Effect of the Testimony.

the Death of  
the Bank-  
rupt, Evi-  
dence upon  
a Petition in  
his Bank-  
ruptcy to  
expunge the

*Mr. Leach*, *Mr. Cullen*, and *Mr. Agar*, urged that the Deposition was in Fact nothing but an Affidavit, and used by the Commissioners as a Clue to direct them in the Investigation of the Subject upon which it has proceeded.

Debt of a  
Creditor; but  
it may be



1814.  
*Ex parte*  
 CAMPBELL.  
 —In the  
 Matter of  
 BROMER.

that upon this Application *Bromer's* Affidavit, had not Death intervened to prevent his making it, would have been admissible; these Depositions had all the Safeguards which could be thrown around Evidence; he had undergone the Examination in Question, under the Sanction of an Oath, and the Hazard of an Indictment for Perjury.

*The Lord CHANCELLOR.*

I have been frequently much at a Loss to understand the Principle of the Practice in Bankruptcy, upon an Allegation of Usury. Where a Defendant at Law resists a Debt upon that Ground, he is confined to strict Evidence of the Objection: if he comes to a Court of Equity, to wring a Confession from the Conscience of the Plaintiff at Law, he is only assisted here upon Payment of what he admits to be untainted of the Usury. The Jurisdiction in Bankruptcy, which is said to proceed both upon legal and equitable Principles, seems to go much farther than those Principles in their Combination authorize. Upon a Petition in Bankruptcy, stating merely the Information and Belief of the Petitioner, we throw upon the Creditor, at the Hazard of losing the Whole of his Debt, the Necessity of exonerating himself from an Imputation, which may be said rather to be insinuated against him than charged. It has been observed, that the Difference between this and the Practice in Equity arises from the Difficulty of making an Order on the Bankrupt's Estate, to pay what is unaffected by Usury; but surely that Reason could be no Objection to the Direction of a Proof of it.

With respect to the Admission of *Bromer's* Examination as Evidence: *Bromer*, in the first Place, as an uncertificated Bankrupt, would be an incompetent Witness  
 to

to the Usury (*a*). If he were alive, and I sent him (not having obtained his Certificate) to be examined at Law, I would at the same Time have given Liberty for *Clay* to be examined with him. Surely there is a vast Difference between sending *Bromer* before a Jury with a full Opportunity of being examined and cross-examined upon the Subject of this Deposition, and relying, as conclusive of the whole Truth, upon this Deposition alone.

1814.

*Ex parte*  
CAMPBELL.  
—In the  
Matter of  
BROMER.

Suppose an Examination under a Bankruptcy against *A.*, stating, amongst other Things, Facts immaterial under that Bankruptcy, but material under another Bankruptcy against *B.*; and suppose that they are used as Evidence in that Bankruptcy against *B.*, and turn out to be false: how could you sustain an Indictment for Perjury? First, as to the Bankruptcy of *A.*, they are immaterial (*b*); and next under that of *B.*, they have not the Character of an Oath.

To the Extent of guiding the Commissioners in the Prosecution of an Enquiry under their Commission, such Depositions may be used with Correctness and Advantage; but I cannot, in a Matter of Litigation, consider them as Evidence.

(*a*) 2 T. R. 496.

dictment for Perjury, *vide*

(*b*) For the Necessity of *Hawk.* Pleas of the Crown, proving the Materiality of *c. 69. s. 8.* Crown Cir. Comp. the Falsehood upon an In- 613. 628.

*Ex parte*

LINCOLN'S  
INN HALL,  
Aug. 1814.

Joint Creditors are not permitted to prove against the separate Estate where there is joint Property, however trifling in Amount

*Ex parte* PEAKE.—In the Matter of WARBURTON.

THE joint Creditors applied to be admitted to prove against the separate Estate, and were opposed by an Affidavit on the Part of the separate Creditors, that there were joint Effects. It was stated however, and without Contradiction, that the joint Effects were in Value only about £1 : 11s : 6d.

*The Lord* CHANCELLOR.

If in Point of Fact there is joint Property, whether to the Amount of five Pounds or five Shillings, it is an Answer to this Application. Convenience requires that the established Practice of the Court should be understood and adhered to (a). If the Property, alleged to exist in this Instance, be of such a Nature, and in such a Situation, that any Attempt to bring it within the Reach of the joint Creditors must be deemed a desperate, or in Point of Expense, an unwarrantable Attempt; that would authorize a Departure from the Rule (b). In Truth there would then be no joint Property.

Refer it to the Commissioners, to ascertain whether there be joint Property or not.

Sir Samuel Romilly and Mr. Montague, in Support of the Petition.

Mr. Hart, *contra*.

(a) There were during these Sittings many similar Applications, and met by a similar Resistance. In *Ex parte* — established to the Amount of £5 was ruled to be a complete Bar to the Application. (b) See the Rule stated in Vol. I. p. 21. *Ex parte* Taitt, 16 Ves. 193.

*Ex parte*

*Ex parte* BURN.—In the Matter of MOULSON.

LINCOLN'S  
INN HALL,  
Aug. 1814.

ON the 4th Day of December 1810, *John Aspinwall* proved a Debt under this Commission, upon a Deposition stating, that the Bankrupt was at and before the Date and suing forth of the Commission of Bankrupt, and then was, justly and truly indebted unto him in the Sum of £2772: 7s: 9d. for Money had and received by the said Bankrupt to and for the Use and on the Account of the said *John Aspinwall*, and for which Sum or any Part thereof, the said *John Aspinwall* had not, nor any other Person or Persons whosoever, for the Use of the said *John Aspinwall*, received any Security or Satisfaction whatsoever, save and except four Bills of Exchange, the Particulars of which were stated in the Deposition (a); and all which said Bills were indorsed by the Bankrupt,

Where a Creditor, holding Bills of Exchange, proves their Amount as his Debt, with a Statement that he holds the Bills as Security, and any of the Bills are subsequently paid by the other Parties to them, the Amount so paid

must be deducted from the Proof and the Dividends; or if the Dividends have been paid upon the Whole of the Proof without such Deduction, the Assignees are not thereby concluded; for the Lord Chancellor will order them to be refunded.

It makes no Difference whether the Bills have been deposited without Indorsement, or have been indorsed by the Bankrupt to the Creditor.

(a) One for the Sum of £65: 9s., dated the first Day of May, 1810, drawn by *Robert Parker and Co.* upon and accepted by *Parker and Scobell*, payable to *Parker and Co.*, or Order, six Months after Date, and indorsed by the said *Robert Parker and Co.*, and by the said Bankrupt. Another Bill of Exchange, for the Sum of £730: 16s., dated the first Day of May, 1810, drawn by *Robert Parker and Co.* upon and accepted by *Rowlandson and Bates*, payable to *Parker and Co.*, or Order, eight Months after Date, and indorsed by the said *Robert*

1814.

*Ex parte*  
BURN.—In  
the Matter  
of MOULSON.

Bankrupt, had been dishonoured, and Notice thereof given to him, and were then in the Hands of the said *John Aspinwall* wholly unpaid and unsatisfied.

The four Bills of Exchange amounted to the Sum of £2881: 7s.; the Debt intended to be secured, to the Sum of £2772: 7s.: 9d.

On the 22d Day of *April*, 1811, *Aspinwall* received from *Joseph Barber* the full Amount of his Acceptance for £247: 12s., and from the Estate of *James Nixon* and Co. the Sum of £1332: 3s.: 9d., being 14s.: 6d. in the Pound on the Bill for £1837: 10s.; and on the 2d Day of *December*, 1811, he received the Sum of £202: 2s.: 6d. from the Estate of *Rowlandson* and *Bates*, being 4s. in the Pound on the Bill for £1837: 10s.: which said Sums of £1332: 3s.: 9d. and £202: 2s.: 6d. made together the Sum of £1534: 6s.: 3d., and left only the Sum of £303: 3s.: 9d. unpaid, on the Bill for £1837: 10s.

On the 12th Day of *May* last a Dividend of 4s. in the Pound was declared under *Moulson's* Commission, and *Aspinwall* applied to the Petitioners for Payment of that Dividend on the Sum of £2524: 15s.: 9d., the Residue of his Proof for £2772: 7s.: 9d. after

*Robert Parker* and Co., and by the said Bankrupt. Another Bill of Exchange, for £1837: 10s., dated the twenty-fifth Day of *May*, drawn by *Rowlandson* and *Bates*, upon and accepted by *James Nixon* and Co., payable nine Months after the Date thereof, and indorsed by the said *Rowlandson* and *Bates*, and the said Bankrupt. Another Bill of Ex-

change, for £247: 12s., dated the nineteenth Day of *December*, 1809, drawn by *William* and *Richard Barber*, upon and accepted by *Joseph Barber*, payable sixteen Months after the Date thereof, and indorsed by *William* and *Richard Barber*, and the said Bankrupt.

deducting

deducting the Bill for £247 : 12s. which had been paid in full.

1814.

*Ex parte*

BURN.—In  
the Matter  
of MOULSON.

The Petitioners however insisted, that upon Payment of the Sum of £303 : 3s. : 9d., being so much of the Bill for £1837 : 10s. as then remained unpaid, they had a Right to have it given up to them; and that, deducting it and Barber's Payment of £247 : 12s., making together £2085 : 2s. from the Proof of £2772 : 7s. : 9d. *Aspinwall* would be entitled to receive a Dividend only upon £687 : 5s. : 9d. as the Residue of his Debt.

*Aspinwall* not coinciding with them in this Arrangement, in August 1813, preferred a Petition, and obtained an Order for the Payment of the Dividend of four Shillings in the Pound upon the Sum of £2524 : 15s. : 9d., with Interest and Costs.

The Petitioners now preferred the present Petition, stating those Circumstances, and concluding with a Prayer that *Aspinwall* might be restrained from all Proceedings under the Order of August 1813; that the Proof might be expunged, or that upon Payment of the Sum of £303 : 3s. 9d., the Residue of the Bill for £1837 : 10s., the Proof might be reduced to the Sum of £687 : 9s., and that *Aspinwall* might be ordered to deliver up to the Petitioners the Bill for £1837 : 10s. and authorize them to receive all further Dividends thereon from the Estates against which he had proved the same; and in Case *Aspinwall* should have received the Dividend under the Order obtained by him, before this Petition could be heard, that he might be decreed to repay what he should have received more than he ought to have done on Account of his Proof.

Sir Samuel Romilly, Mr. Bell, and Mr. Duckworth,  
in

1814.

*Ex parte*BURN.—In  
the Matter  
of MOULSON.

in Support of the Petition, cited *Ex parte Smith*, *Ex parte Bloxam*, *Ex parte Wallace*, *Cooke's Bankrupt Laws*, 167.

Mr. *Hart*, Mr. *Cullen*, and Mr. *Agar*, *contra*, distinguished this from the Cases cited. There is considerable Difference where a Person voluntarily and by his own Act reduces his Debt, and where it is to be reduced by the adverse Interposition of the Assignees, which ought not to be active to the Prejudice of the Creditor. The Creditor might have proved for the Bills, and not for the Debt as secured by the Bills; and the Form of his Proof ought not to operate against his Right. Here two Dividends have been ordered and paid upon the Debt, and the Claim is concluded.

*The Lord CHANCELLOR.*

There is no Doubt, that *Aspinwall* having treated these Bills as a Security in his Deposition, and having proved his Debt with the Exception of them, is now precluded from saying that they are not to be treated as a Security, because they are indorsed. The Bankrupt was the last Indorser of the Bills: if they had not been put into the Hands of *Aspinwall*, they would have remained his Property. There is great Difficulty in saying, that the Assignees have no Right to take out of the Hands of a Depositary, Property left with him as a Security for a Debt covered by Payments from other Sources. If *A.* gives *B.* a Bill to the Amount of £300, as a Security for a Debt of £150, whether *A.* indorse it or not, as against him, *B.* can only prove £150, and he will be a Trustee for *A.* in Respect of any Surplus which he may receive from the other Parties to it.

I do not think that the former Petition, upon which the Payment of these Dividends were ordered, makes any  
Difference;

Difference; there can be no Doubt of the Authority of this Court to recal them, and the Practice hath been long established (a).

1814.

*Ex parte*  
BURN.—In  
the Matter  
of MOULSON.

(a) *Ex parte* DEWDNEY. be expunged. *Vide* 15 *Ves.*

The Lord Chancellor, upon R. 479. Before, however, the Order was made, the by the Assignees, directed Creditor had received Divi- the Proof of a Debt, upon dends upon his Debt. Upon which, previously to the a Petition heard during these Bankruptcy, the Statute of Sittings, he was ordered to Limitations had attached, to refund them.

In the Matter of LEWIS.

LINCOLN'S  
INN HALL,  
August, 1814.

**T**HIS was an Application to supersede a Commission, which had issued against an Attorney, as a Scrivener, the Bankruptcy under which had been recently found, and to prevent the Insertion of the Advertisement in the *Gazette*, upon the Authority of the Cases of *Ex parte Foster* (a), and *Ex parte Proston* (b), and upon an Inference from the Case of *Adams v. Malkin* (c), that no such Trading as that of a Scrivener was now in Existence.

Although the Lord Chancellor will stop the Progress of a Commission against one, who is not properly the Object of it, and although the strong Probability is, that no Person can now be

*The Lord CHANCELLOR.*

I consider it to be clearly my Duty to prevent the

the Object of it as a Scrivener, yet that Probability is not in itself a Ground for such Interference.

(a) 1 Vol. 49.

(c) *Ante*, p. 27.

(b) *Ibid.* 259.

Mischief



1814.  
In the  
Matter of  
LEWIS.

Mischief of a Commission of Bankrupt operating against a Party who is undoubtedly not the Object of it. In the Cases cited, I acted upon that Principle. But if the Depositions here have established the Man to be a Bankrupt, how can I interfere? The Question is, whether the Evidence is sufficient to support the Adjudication. Is it contended that the Case of *Adams v. Malkin* must be considered so decisive upon the Existence of this Species of Trading, that I am never to seal a Commission against a Scrivener? my private Opinion certainly coincides in that Inference, but still it is a Question for the Consideration of a Jury; and looking at the Deposition which has been handed up to me in this Case, I feel that this is not a Case in which I can prevent the Progress of the Commission.

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The Lord *Chancellor* having expressed a Wish that the Insertion in the *Gazette* might be deferred till the *Tuesday*, and no Damage being on that Account likely to affect the Property, and the Solicitor to the Commission being in Court, and consenting to it, the Insertion of the Advertisement was directed to be suspended till the *Tuesday*.

*Ex parte*

*Ex parte* BONSOR.—In the Matter of LLOYD.

*Trinity Term,*  
1814.

**T**HIS was a Petition by a Creditor who had proved, to supersede a Commission upon an Objection to the Trading and the Debt. Before it could, according to its Place in the Paper, be brought to a Hearing, the Bankrupt obtained his Certificate. A Petition was then presented to stay the Certificate (*a*), the Hearing of which, the Bankrupt anticipating the Discussion of the Validity of the Commission, obtained an Order to advance.

Against the Allowance of the Certificate, was urged the Pendency of the Petition to supersede the Commission, and that it would be quite useless to grant a Certificate, which would fall with the Commission, in the Event of its being superseded. On the other Hand, it was contended that the Certificate was now the only Question before the Court; and that it must either be granted or withholden upon its own exclusive Objections.

*The Lord* CHANCELLOR.

The Certificate must stand upon its own particular Merits. Here the only Difficulty is, that the Petition against the Certificate, refers to the Affidavits in Support of the Petition for the Supersedeas: one of which is, that there is no petitioning Creditor's Debt. If there is no Debt, the Bankrupt cannot have made a full Discovery, and therefore has not entitled himself to his Certificate (*b*).

That there is a Petition pending to supersede the Commission is no Objection to the Allowance of the Certificate, which, while the Commission stands, the Bankrupt is entitled to, unless there be Objections exclusively attaching upon it. A Creditor who has proved is not thereby precluded from applying to supersede the Commission.

(*a*) The Petition to supersede was the 25th February, 1814, and that to stay the Certificate the 24th of May. (*b*) *Ex parte* Shirley, *post*.

I shall

1814.

*Ex parte*

BONSOR.—

In the Matter of

LLOYD.

I shall therefore withhold this Certificate until I have an Affidavit of the Correctness of the petitioning Creditor's Debt.

That Affidavit was made, and the Certificate was allowed.

LINCOLN'S

INN HALL,

Aug. 1814.

The Application to supersede the Commission was now brought on upon the other Petition. It was objected, that the Petitioner, having proved under the Commission, was precluded from applying to supersede it.

*The Lord CHANCELLOR*

Said an Objection of that Nature must depend entirely upon the Circumstances under which the Proof had been made, and the Conduct of the Creditor(a): he should lay down no general Rule upon the Subject.

The Commission was superseded.

Mr. *Leach* and Mr. *Rose* for the Petitioner.

Sir *Samuel Romilly* and Mr. *Heald* for the Bankrupt.

(a) *Rankin v. Horner*. 16 *East R.* 191. 1 Vol. 393. N.

*Ex parte*

*Ex parte* SMITH.—In the Matter of HARVEY (*u*).

Easter Term,  
1813.

**H**ARVEY being embarrassed in his Circumstances, *Smith* proposed to pay the Creditors 10s. in the Pound upon their Debts, and to take an Assignment of the Stock in Trade, Fixtures, and Effects of *Harvey*, who was to remain in Possession, for the Purpose of collecting the Debts, and managing the Trade.

The Great Seal will very cautiously relax the Practice which requires a Security to be sold before a Proof can be admitted, by ordering it to be taken at a Valuation.

*Smith* accordingly gave the Creditors his Bills to the Amount of 10s. in the Pound upon their Debts; and from one of them of the Name of *Willock*, received two Leases and a Quantity of Plate, of which he *Willock* was in Possession, under a Deposit of them by the Bankrupt, for the Purpose of securing his Debt.

An Application for that Purpose must depend upon its special Circumstances, of which the general Benefit of the Creditors, and the Amount of the Applicant's Debt, are very material.

*Harvey* then, by Deed, assigned all his Stock, &c. &c. to *Smith*, and still remained in Possession.

A Commission subsequently issued against *Harvey*.

*Smith*, who was a Creditor to the Amount of £3021, presented this Petition, in Substance as stated, and praying that, instead of waiting for a Sale, he might be at Liberty to take the Leases and the Plate, which he had received from *Willock*, and the Stock, &c. &c. which had been assigned to him by the Bankrupt, at a Valuation of £1190, and prove immediately for the Balance of his Debt; offering, in the Event of the Property realizing

*John Jackson*  
*W. G. Smith*  
*12th Nov. 1813*  
*Essex Street*  
*London*

(a) 1 *Ves. and Beames*, B. C. 518.

when

1813.  
*Ex parte*  
 SMITH—  
 In the Matter of  
 HARVEY.

when sold a greater Sum than the Valuation, to pay over the Balance to the Assignees of the Bankrupt.

Sir *Samuel Romilly* and Mr. *Hart* rested the Application upon the Authority of *Ex parte Nunn (a)*, *Ex parte De Tasted (b)*.

Mr. *Leach* and Mr. *Montague* opposed it. The Cases cited are Exceptions to the general Practice, and ought never to be acted upon, except where the Right to retain the pledged Property was unobjectionable; here the Petitioner founded his Right upon a Deed of Assignment, which was an Act of Bankruptcy.

*The Lord CHANCELLOR.*

The Practice has been long established in Bankruptcy, not to suffer a Creditor holding a Security to prove, unless he will give up that Security, or the Value has been ascertained by the Sale of it. The Reason is obvious: till his Debt has been reduced by the Proceeds of that Sale, it is impossible correctly to say what the actual Amount of it is; and with this further Consideration, that in the Event of any Doubt attaching upon his Right to retain the Security, he is enabled in a Contest with the Rest of the Creditors to sustain his disputed Title in a Situation of predominant Advantage.

It is however clearly within the Discretion of the Court to relax this Rule; and Cases may occur in which it would be for the Benefit of the general Creditors to relax it. Suppose for Example, a Creditor holding the Security of the Mortgage of a *West India* Estate, or an Assignment of its Produce in a falling Market; there

(a) 1 Vol. 322. (b) *Ibid.* 324. 1 *Ves.* and *Beames*, 280.

can be no Doubt that the Interest of all Parties would require that the Value of the Property should be, as speedily as possible, realized against its contingent Depreciation. The Court has, and ought to have this Discretion, cautiously, however, attending to the Circumstances of each particular Case in the Exercise of it.

1813.  
*Ex parte*  
SMITH.—In  
the Matter  
of HARVEY.

In the Case cited (a), although the Right to retain the deposited Property was disputed, it bore but a small Proportion to a very enormous Debt. I thought that the Creditor ought not to be shut out from voting in the Choice of Assignees; controlling, however, that Right, so as not to prejudice its Interference with a due Investigation of his Claim to the Property in Dispute.

Comparatively speaking, in this Case the Petitioner's Debt is inconsiderable, which, in one View, is material (b); and his Lien arises out of this general Assignment, which is clearly an Act of Bankruptcy, and inoperative to pass the Property as against the general Creditors. This indeed has not been disputed; but then it is said, that the Assignment being set aside, he is remitted to his derivative Deposit from *Willock*; and I think he is, as far as it can operate to the Satisfaction of the Amount in Respect of which *Willock* was entitled to hold it: but certainly not beyond it.

Upon the Whole, I see nothing in this Case to exempt it from the general Practice. The Petitioner may prove his Debt, excepting so much of it as extends to his de-

(a) *Ex parte De Tasted*. here went through the Circumstances of the Case as Vol. I. p. 325.

(b) The Lord Chancellor already stated.

1813.

*Ex parte*  
SMITH.—In  
the Matter  
of HARVEY.

rivative Lien from *Willock*: as to that, it must stand over till the Value of it has been regularly ascertained.

*Ex parte* TOMLINSON.—In the Matter of  
KERSHAW.

*The Lord CHANCELLOR.*

THE Majority of the Assignees must regulate the Removal or Continuation of their Solicitor: nor can one Assignee set up his Wishes, in this Respect, against the fairly exercised Discretion of the others.

*Vide* Vol. I. p. 207.

*Ex parte* DUNMAN.

THE Bankrupt *Dunman*, in this Case, complained that by the Mismanagement of his Assignees, his Property had not been realized for his Creditors to its fair Extent; charging as an Instance, that the Lease of his Warehouse, &c. had been sold by Private Contract, and for considerably less than it would have produced by Public Auction.

*The Lord CHANCELLOR.*

There is nothing in the Statutes to prevent Assignees selling by Private Contract; it may be frequently most advantageous for the Creditors, and with their Consent would be unobjectionable. It is, however, a Circum  
stance

stance of Evidence, not to be disregarded upon a Complaint that the Property, by a different Mode of disposing of it, might have been rendered more productive.

1814.  
~  
*Ex parte*  
DUNMAN.

Refer it to the Commissioners, to inquire whether the Property could have been sold to any and what greater Advantage.

*Ex parte* HARRIS.

LINCOLN'S  
INN HALL,  
Aug. 1814.

UPON this, a Petition by the Bankrupt to supersede his Commission, a Reference had been made to the Commissioners at *Exeter*, to inquire into the Act of Bankruptcy. They found and certified the following. *Robert Widger*, a Creditor of *Harris* to the Amount of eight Shillings, went to *Harris's* House to buy Leather to the Amount of his Debt. He did not, as he expressly stated in his Deposition, go for his Money; but to "get Leather and buy it out." He went to the Workshop, which was detached from the House, and inquired of a Servant if *Harris* was there: the Servant said he was at Home. He immediately left the Workshop, and went round to the Front of the House: he there heard *Harris's* Voice up Stairs very distinctly, and saw his Hat on the Table in the Parlour. He knocked; a Female Servant came down; he inquired for her Master: the Girl went up Stairs and informed her Master; some Answer was given, but what he did not distinctly hear, and she came down again and said her Master was gone out.

It is an Act of Bankruptcy, by beginning to keep House, for a Trader to cause himself to be denied to a Creditor, calling, not for Payment of his Debt, but in Order to cover it by buying Goods to the Amount.

Sir *Samuel Romilly* and Mr. *Cooke* insisted that the Act of Bankruptcy was not established.

Mr. *Hart contra*.



1814.

*Ex parte*  
HARRIS.*The Lord CHANCELLOR.*

Is there any Case which establishes, that to constitute this Act of Bankruptcy, it must be a Creditor calling for Money? The Act is, beginning to keep House with Intent to delay Creditors. If a Trader, desirous of avoiding the Access of his Creditors upon their ordinary Demands, and in a Course of Business, has given Orders generally to be denied, and is denied, it is an Act of Bankruptcy. It is not their Object in calling which the Statute contemplates, but his Intention in being denied. I think in this Case the Evidence of the Intention is sufficient, and that this is an Act of Bankruptcy.

*Vide Bayley v. Schofield, post.*LINCOLN'S  
INN HALL,  
Aug. 1814.*Ex parte* MILES.—In the Matter of REES.

Where the Interest of any particular Class of Creditors is not sufficiently represented and protected by the Assignees under the Commission, the Court will appoint an Agent or In-

spector on their Behalf, giving him Authority, and Indemnity in Point of Expense, as fully as if he were actually an Assignee

Till the Debt is set aside, the Court will not remove a Creditor from his Office as Assignee, upon Suspicion of its Unfairness.

**T**HE Bankrupt carried on the Business of a Linen-Draper; not having upon an Average of the last two or three Years kept a larger Stock than from £400 to £500. In the three Months previous to his Bankruptcy, he purchased on Credit from the Petitioners and other Tradesmen, Goods to the Amount of £4500; and made himself responsible upon different Bills of Exchange to the Amount of £5000 and upwards. The Bills were drawn by *Moses Moses*, the Brother-in-Law, and *Benjamin Benjamin* the Nephew of the Bankrupt. His Stock upon the Premises at the Bankruptcy was only

£500.

£500. The Holders of the Bills voted in and carried the Choice of Assignees. The Creditors for Goods sold proposed at the Meeting, that some Person acquainted with the Trade of a Linen-Draper should be nominated on their Behalf and to attend to their Interests, together with the Assignees; and the Commissioners strongly recommended to the Creditors on the Bills to accede to the Proposal: they, however, insisted upon their legal Right to elect the Assignees. The Petition alleged that these Bills were for the most given without Value; that it was of great Importance to the Petitioners that some Person should be appointed to attend to their Interests, and ascertain how the Bankrupt had disposed of the Goods to the Amount of £4500, which he purchased within three Months previous to his Bankruptcy; and that it should also be ascertained for what Purpose the Accommodation Bills were created. The Petition therefore prayed, that the Petitioners and the other Creditors for Goods sold, might be at Liberty to nominate a Person to act as an Assignee with the Assignees elected; or that the Assignment then executed might be vacated.

1814.  
*Ex parte*  
 MILES.—  
 In the Matter of  
 REES.

Sir *Samuel Romilly* and Mr. *Montague* supported the Petition.

Mr. *Hart* and Mr. *Cullen* opposed it.

*The Lord CHANCELLOR.*

The Great Seal has undoubtedly Jurisdiction to control Creditors in the Exercise of the legal Rights which the Statute (a) confers upon them. They are invested with those Powers for the Benefit of all the Creditors; and it is upon that Principle that the Court regulates its

(a) 5 Geo. II. c. 30.

Interference.

1814.  
*Ex parte*  
 MILES.—  
 In the Matter of  
 REES.

Interference. The Practice is notorious, that an Assignee with Interest adverse to the general Body of the Creditors may be removed; unless the contested Interest can be adjusted without removing him, by some Qualification of his Authority (a). In Cases where Creditors are, in Respect of their Interests, unrepresented under a Commission, as in the Case of separate Creditors who have no Right to vote in the Choice of Assignees under a joint Commission, or of joint Creditors who have no Right to vote in such Choice under a separate Commission; the Court, in a Case requiring it, will appoint a Person as an Agent or Inspector, with ample Authority to take Care of their Interests, and will provide for his Reimbursement and Indemnity, in Point of Expense, out of the Estate, in as full a Manner as if he were actually an Assignee (b).

There certainly is much Suspicion operating in this Case, against the Class of Creditors whose Preponderance of Proof has appropriated to themselves the Direction of the Affairs in this Bankruptcy: much Doubt, to say the least, as to the Fairness of their Debts. But while they remain actually Creditors, I do not feel myself authorized to disturb their Appointment as Assignees, merely upon Suspicion. The Creditors however for Goods sold and delivered shall have Liberty to investigate the Debts created by these Accommodation Bills, and to trace the Goods purchased within three Months antecedent to the Bankruptcy, and may appoint a Person on their Behalf to conduct that Investigation. Upon the Result of that Investigation the Court will know how to act as to the Removal of these Assignees; and if the Circumstances

(a) *Ex parte De Tasted*, 1 Vol. 324. (b) *Ex parte Basarro*, 1 Vol. 266.

call for it, not at the Expense of the Estate, but of those in whose Misconduct the Necessity of the Application has originated.

1814.

*Ex parte*

MILES.—

In the Matter of

REES.

*Ex parte* SHIRLEY.—In the Matter of BRAHAM.

*The Lord* CHANCELLOR

**E**XRESSED his Determination, and desired it to be understood, that he never would allow a Certificate, where it appeared that the Bankrupt had knowingly suffered fictitious Debts to be proved against his Estate.

*Vide Ex parte Laffert*, 1 Vol. 330.

LINCOLN'S

INN HALL,

Aug. 1814.

*Ex parte* BIRKETT.—In the Matter of REYNOLDS.

**T**HIS was a Petition presented to obtain an Order for the Sale of certain Freehold and Leasehold Estates, and to be admitted to prove for the Residue. It was met by an Objection, that the Mortgage was subsequent to an Act of Bankruptcy. It was therefore referred to the Commissioners to inquire, whether the Petitioner had any Mortgage or equitable Mortgage, and whether it was affected by any Act of Bankruptcy. The Relation to the Act of Bankruptcy is confined to an Act subsequent to the Petitioning Creditor's Debt.

The Commissioners by their Report found that *Birkett* was a Mortgagee of the Freehold Premises, by Indentures

1814.  
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*Ex parte*  
 BIRKETT.—  
 In the Matter of  
 REYNOLDS.

dentures of the 21st and 22d *March*, 1811 (*a*); and they also found, that in the Months of *October* and *November* 1810, the Bankrupt committed several Acts of Bankruptcy; and that there was at the Time of such Acts of Bankruptcy a Debt upon which a Commission might have been issued. They therefore concluded that the Mortgage was invalid. The Petitioner knew at the Time of taking the Security that *Reynolds* was insolvent.

The Petitioning Creditor's Debt, upon which the Commission actually issued, did not arise till the Month of *June*, 1811; subsequently another Act of Bankruptcy was committed, upon which the Commission issued on the 13th of *January*, 1812.

Mr. *Leach* and Mr. *Cooke*, in Support of the Petition, contended that the Commissioners' Report was erroneous; that an Act of Bankruptcy antecedent to the Petitioning Creditor's Debt, unless under the Circumstances guarded against in the Statute, could have no Effect upon the Commission, or defeat the Dealing and Transactions of the Bankrupt. Previously to 46 *Geo. III.* Assignees could not by Relation have availed themselves of an Act of Bankruptcy and Debt antecedent to the Petitioning Creditor's Debt, and the Act of Bankruptcy upon which their Commission had proceeded, without destroying their Title as Assignees. The Object of the Act of Parliament was to protect the fair Transactions of the Bankrupt from being rescinded, and the Commission from being defeated by the Hardship of that Relation. The Assignees have not been placed in a worse Situation than

(*a*) They found, likewise, hold Premises, which it is Circumstances raising an unnecessary to detail.  
 equitable Title to the Lease-

they

they were in before that Statute; and it was not its Intention that they should be placed in a better.

1814.

*Ex parte*

BIRKETT.—

In the Matter of  
REYNOLDS.

Mr. Cullen contended that the Operation of the Act of Parliament (a) was confined to the Protection of the Commission; that it never was intended to destroy the Relation to the Act of Bankruptcy, or to exclude the Assignees from retrieving Property vested in them by the legal Operation of that Objection.

*The Lord CHANCELLOR*

However dissented from this Construction of the Statute, declared his Opinion to be, that the Relation to the Act of Bankruptcy could not be carried back beyond the Debt upon which the Commission had proceeded, and made the Order in the Terms of the Petition.

Sir Samuel Romilly, *amicus curiæ*, said that he had had Occasion to consider the Construction of the Section in Question, and coincided in that which had been adopted by the Court.

(a) 46 Geo. III. c. 135. s. 5. contracted. But such Commission, and all Proceedings shall be avoided or defeated, under the same, shall be valid by Reason of any Act of Bankruptcy prior to the Debt and Purposes, notwithstanding such prior Act or Acts of Bankruptcy. See also the Act of Bankruptcy at the first and second Sections, and Time when his Debt was 49 Geo. III. c. 135. s. 2.

*Ex parte*

LINCOLN'S  
INN HALL,  
Aug. 1814.

*Ex parte* GRAHAM. In the Matter of KENSINGTON.

A Banker became bankrupt, having in his Hands Money of a Bankrupt Estate, under which he was a Creditor: held that he was not entitled to receive a Dividend on his Debt, till the Bankrupt Estate had been reimbursed the Loss occasioned by his Insolvency.

ON the 17th of *August*, 1810, a Commission of Bankrupt issued against *Rowlandson* and Co. *Kensington* and Co. were Creditors to the Amount of £8247 : 18s. They proved their Debt; and were appointed the Bankers to the Estate.

On the 22d of *July*, 1812, *Kensington* and Co. became Bankrupts, having in their Hands a Sum of £28,079 : 19s. : 10d. the Property of *Rowlandson* and Co. On the 25th *July*, 1812, a Dividend of 4s. in the Pound was declared under *Rowlandson* and Co.'s Commission, which upon the Debt proved by *Kensington* and Co. amounted to a Sum of £1649 : 11s. : 7d.

On the 27th *January*, 1813, a Proof was made by the Petitioners, *Rowlandson* and Co.'s Assignees, against *Kensington* and Co.; but in making that Proof, they deducted the Dividends due to *Kensington* and Co.

They now applied to prove the deducted Sum of £1649 : 11s. : 7d. in Addition to the Sum of £26,490 : 8s. : 3d. already proved against the Estate of *Kensington* and Co., and to retain the Dividends on the Sum of £8247 : 18s. proved by *Kensington* and Co. against *Rowlandson* and Co.

Sir *Samuel Romilly* and Mr. *Roupell* in Support of the Petition.

Mr. *Hart* and Mr. *Wilson contra*.

*The*

*The Lord CHANCELLOR.*

The Property which was deposited in *Kensington's* Bank was the Property of all the Creditors of *Rowlandson* and Co. *Kensington's* Assignees are not entitled to take their Dividend until those Creditors are set right in Respect of the Subtraction of that divisible Fund from them. The Assignees are entitled to call out the Whole of that Fund to make a Dividend of it; and until the £28,000 is paid, minus the Dividends, to which the Assignees of *Kensington* and Co. themselves would be entitled, they can receive nothing from *Rowlandson* and Co.'s Estate.

1814.

*Ex parte*  
GRAHAM.—  
In the Matter of  
KENSINGTON.

*Ex parte* BENSON.

LINCOLN'S  
INN HALL,  
Aug. 1814.

**T**HIS was an Application, that a Witness who had refused to obey the Commissioners' Summons might be ordered to attend them, and might pay the Costs of this Application. He had refused to attend without having his Expenses paid him.

Mr. *Cullen*, in Support of the Petition, cited *Battye* v. *Gresley*, 8 *East*, 319.

Mr. *Johnson* contra.

*The* LORD CHANCELLOR.

At Law certainly a Witness is not bound to attend, unless his Expenses shall have been previously tendered an Attachment. Such Witness however is to have his reasonable Costs: to be settled by the Commissioners.

A Witness, summoned by Commissioners, is bound to attend; although his Expenses may not have been tendered to him: although if he in Fact be prevented by Want of Means, it would be an Answer to an Application for

to



1814.   
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*Ex parte*   
 BENSON.   
 to him. The Difference in this Case is created by the Statute (a), which gives the Commissioners an Authority to compel the Attendance of Witnesses; providing however, that the Witnesses shall have "such Costs and Charges as the Commissioners in their Discretion shall think fit." The Course intended, and to be adopted, is to leave the Witness, in the first Instance, under the Necessity of Obedience to the Summons; but to be reimbursed the Expense he may be put to, either by the Commissioners, or upon Application here. Shewing that he had not the Means of enabling him to attend would be an Answer to an Application to proceed against him for a Contempt; and as I understand the Rule of the *King's Bench*, that Court will not grant an Attachment (b), without shewing that there has been a Tender of Expenses. It is not perhaps necessary to make an express Order in this Case. Let it be understood that the Witness must attend; and that he is entitled to have his reasonable Costs and Charges to be settled by the Commissioners.

(a) 1 *Jac.* 1. c. 5.

(b) 2 *Tidd's Pract.* 723.

LINCOLN'S   
 INN HALL,   
 August 14,

1814.

*Ex parte* HARRISON.—In the Matter of   
 NICHOLSON.

The Owners of a Ship are not interested in it as joint Tenants, but as Tenants in Common: upon a Bankruptcy, therefore, the Bankrupt's Share passes to the Creditors under the Bankruptcy, without being liable specifically to the Claims of the other Part Owners, in Respect of their Disbursements and Liabilities for the Ship.

HARRISON purchased of Wall the Moiety of a Ship, the other Moiety of which had been previously

purchased

purchased by *Nicholson*, who had left unpaid of the Purchase Money a Sum of £265. When the Ship was on the Point of going to Sea, *Wall*, the Vendor, refused to suffer her to proceed unless *Harrison* would join *Nicholson* in accepting a Bill for that Sum. *Harrison* accordingly joined in accepting a Bill for the Sum of £265, expressed to be for Value received in Purchase of the Ship. Before the Maturity of the Bill, *Nicholson* became bankrupt. The Holder of the Bill, when it became due, commenced an Action against *Harrison*; proceeded to Execution; seized the Ship, and sold the Moiety belonging to *Harrison*, and out of the Proceeds paid the Debt, Interests, and Costs, amounting to £368.

1814.

*Ex parte*  
**HARRISON.**  
—In the  
Matter of  
**NICHOLSON.**

The Petition further alleged, that before the Act of Bankruptcy *Harrison* and the Bankrupt had become indebted to various Persons in the Sum of £180, for Goods and Necessaries furnished to the Ship: that the Bankrupt was, during five successive Voyages, managing Owner of the Ship, and received her Freight and Earnings without accounting to the Petitioner.

The Petition insisted that the Whole of the Ship was liable to the Discharge of those Debts; that the Petitioner was entitled to a Lien against the Bankrupt's Moiety for the Sum of £368, and of £180, and for a Moiety of the Profits of the five Voyages: and concluded with a Prayer to that Effect.

*Sir Samuel Romilly* and *Mr. Wray*, in Support of the Petition, cited *Doddington v. Hallett*, 1 *Ves.* 479.

*Mr. Hart* and *Mr. Montague contra.*

*The*

1814.

*The Lord CHANCELLOR*

Declared his Opinion to be against the Lien, and dismissed the Petition.

*Ex parte*  
HARRISON.  
—In the  
Matter of  
NICHOLSON.

In *Doddington v. Hallett*, “and in an undivisible personal Chattel.  
Lord *Hardwicke* declared his “I certainly differ from  
Opinion to be in Favour of “Lord *Hardwicke*: but I  
such a Lien. Vide *Abbott* “hesitate to decide against  
on Shipping, 99. “his deliberate Judgment in

In *Ex parte Young, Lincoln's Inn Hall, August, 1813*, “a Cause upon a Petition in  
the same Question was raised, “Bankruptcy. The better  
and received from the Lord “Way will be, at present to  
*Chancellor* the following In- “intimate my Opinion to be  
timation of his Opinion.— “against this Lien, leaving  
“*Doddington v. Hallett*, I “the Parties, if dissatisfied,  
“know from a MS. Note to “to apply for a Rehearing. I  
“have been L. *Hardwicke's* “have no Doubt that Freight  
“deliberate Judgment. In a “is liable to the joint De-  
“Case of joint Property, I “mands: as to the Ship, it  
“admit there cannot be much “stands upon the nice Di-  
“Difficulty: it is different in “stinction of a Tenancy in  
“a Tenancy in common, “common.”

LINCOLN'S  
INN HALL,  
Aug. 1814.

*Ex parte GARBUTT.*

Upon an  
Application  
for the Sale  
of an equi-  
table Mort-

gage, the Costs of the Assignees are to be paid out of the Proceeds of the Estate.

THIS was a Petition by an equitable Mortgagee, to have the mortgaged Premises sold, and a Proof for the Difference. The only Question was, whether

the

the Costs of the Application, including those of the Assignees, were to be paid out of the Proceeds of the Sale.

1814.

*Ex parte*  
GARbutt.

*The Lord* CHANCELLOR

Was of Opinion, that as the Necessity of the Application was created by the Defect of the Petitioner's Title, the Expenses of it, and of all fair Inquiries into the Validity of the Security, should be satisfied out of the Proceeds of the Sale, unless indeed where the Assignees by an unnecessary and vexatious Resistance should call for a Deviation from that Practice.

The Order therefore was made—the Costs of the Application, including those of the Assignees, to be paid out of the Proceeds of the Estate.

Mr. Agar for the Petitioner.

Mr. Cooke for the Assignees.

*Ex parte* LOARING.—In the Matter of WRIGHT.

LINCOLN'S  
INN HALL,  
Aug. 1814.

**T**HE Petitioner sold to the Bankrupt a Freehold Estate; and took as Part of the Purchase Money his Promissory Note for £730 and Interest, at four Months. The Conveyance was executed; a Receipt indorsed for the Purchase Money, and Possession delivered. The Petitioner negotiated the Notes; but previously to their Maturity the Bankruptcy took Place:

Vendor held not to have waived his Lien on the Estate sold, by taking the Promissory Note of the Ven-

dee, and receiving its Amount by Discount.  
in

1814.

*Ex parte*

LOARING.—

In the Matter  
of WRIGHT.

in Consequence of which they were returned upon the Petitioner, and he was obliged to pay them.

The Assignees sold the Estate for £750. To this deducting the Expenses of the Sale, the Petitioner by his present Application claimed to be specifically entitled; and to be admitted to prove for the Residue.

Mr. *Hart* and Mr. *Cooke*, in Support of the Petition, contended that the Petitioner was entitled to the Proceeds of the Estate, upon an Equity which the Court has been in the constant Habit of giving Effect to, unless where excluded by express Contract.

Sir *Samuel Romilly* and Mr. *Cullen contra*, contended that the Notes had been taken as a Payment; at any Rate, as a Security, which the Vendor had adopted, in Substitution for his Lien on the Estate.

*The Lord CHANCELLOR.*

I much wish that this Species of Lien had never been admitted, where the Vendor had accepted a different Security. I cannot however distinguish this from the Cases which have been decided. That the Note was discounted amounts to nothing: it was incidental to the Nature of the Security, and did not vary what it in Substance was, Evidence of an Intention to pay at four Months. I do not believe that either of the Parties had this refined Equity in their Contemplation; but I do not feel that I can refuse to give Effect to it.

Take the Order, undertaking to give up the Notes.

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GRANT

**GRANT v. MILLS.** 2 Ves. and Beames, 306.

Vendor's Lien not discharged by taking Bills of Exchange drawn by him on and accepted by the Partnership of which the Vendee was a Member.

**The Master of the Rolls:**

**The Effect of a Security of a third Person** has never been determined: but I concur with Lord Redesdale, that

Bills of Exchange are not a Security, but a Mode of Payment.

In **HUGHES v. KEARNEY**, 1 Schoales and Le Froy, 136, the Case alluded to by the Master of the Rolls, Lord Redesdale says, *prima facie*, the Purchase Money is a Lien on the Lands. It lies on the Purchaser to shew, that the Vendor agreed to rest on the collateral Security.

1814.

Ex parte

LOARING,—  
In the Matter  
of WRIGHT.

The Principle of this Species of Lien originates in Trust. The Vendee in Respect of the unpaid Consideration being considered as a Trustee for the Vendor. The Result of the Cases establishes the Lien in every Instance, except where by Contract, express or implied from the Nature and Circumstances of the Security, the unsatisfied Vendor has given up the uncharged Dominion of the Estate to the Vendee. A Transfer of Stock (6 Ves. 752.) has been held to discharge the Lien: a Covenant, Bond, Bill of Exchange, or Promissory Note, to leave it unaffected. No

general Conclusion, however, can be drawn from the Nature of the Security alone, whether it be a Transfer of Stock, a Mortgage of another Estate, or of Part of the purchased Estate, although such Securities would raise a strong Presumption, yet the Conclusion of abandoned Lien must still depend upon the particular Circumstances of the Case. See Sugden's Law of Vendors, ch. xii. In order to obviate the Lien, it is there recommended to insert a Declaration to that Effect in the Conveyance, p. 443.

LINCOLN'S  
INN HALL.  
Aug. 1814.

*Ex parte* The BANK of ENGLAND.—In the  
Matter of GRAVES.

A Creditor who, knowing the Partnership of the Parties, takes a Bill drawn by all and indorsed by one, is not entitled to double Proof, upon the Ground, that previously to taking the Bill he required and had the Indorsement of the one, and thereby raised a Contract for double Security.

**G**RAVES, Sharp, and Fisher, indorsed a Bill over to Fisher their Partner, who was also a distinct Trader, and kept a separate Account with the Bank of England. Fisher there discounted the Bill and indorsed it.

The Bank now applied to prove against both Estates. The Knowledge of the Partnership of the Parties was admitted; but a Distinction was taken between this and the Cases regulating this Species of Proof, viz. that the Bank, discounting only for those who keep Accounts with them, always require the Indorsement of their Customer: that although Fisher's Name was included in the Indorsement of Graves, Sharp, and Fisher, yet the Practice required his individual Indorsement, and thereby expressly raised a Bargain for a double Security.

Sir Arthur Piggott and Mr. Winthrop for the Bank of England, relied upon that Distinction.

Mr. Hart and Mr. Cooke opposed it upon the Authority of the Cases (a).

*The Lord CHANCELLOR*

Was of Opinion, that the Practice of the Bank did not vary the Nature of the Bill from what it substantially was, a joint and several Security; which in Bankruptcy was confined in its Proof to a Right of Election against

(a) *Ex parte Adam, Ex parte Bigg*, p. 36.

the joint or the separate Estate. In all the Cases, in which the Holder had been allowed to avail himself of his Security, to the Extent of its apparent Liability, there had either been an Ignorance of the Union of the Parties in one Partnership, or a Subdivision of them into distinct Trading Establishments. Unless therefore this Case could stand upon the Circumstance of *Fisher* being a distinct Trader, it could not stand at all: and that Circumstance resolved itself into nothing more than a Resort to his separate Estate, which, resorting at the same Time to the joint Estate, a Creditor was not entitled to to in Bankruptcy. The Petitioners therefore must elect.

1814.

*Ex parte*  
The BANK  
of ENG-  
LAND.—In  
the Matter  
of GRAVES.

*Ex parte* TITLEY.—In the Matter of RODBUD.

LINCOLN'S  
INN HALL.  
Aug. 1814.

**T**HIS was a Petition that an Attorney at *Manchester* might be ordered to deliver up the Commission and Proceedings: it having been however only served upon his Agent in Town, it was directed to stand over, with Liberty to serve it on the Principal in the Country.

The Ge-  
neral Order  
of 12th Aug.  
1809, held to be  
complied with  
by the So-  
licitor "au-  
thenticat-  
ing" the  
Signature  
of the Peti-  
tioner with-  
out "attest-  
ing" it.

Before that Service could be effected, the Agent handed over the Commission and Proceedings to the Petitioner; and the Question therefore to be disposed of was the Costs.

*The Lord CHANCELLOR*

Gave the Costs of preparing and preferring the Petition (a).

The Object  
of the Order

being to secure the Responsibility of a Solicitor to the Propriety of the Application.

(a) It has now been so frequently ruled that there



1814.

*Ex parte*TITLEY.—In  
the Matter  
of ROBBUD.

The Signature of the Petitioner purported to be “authenticated,” not “attested” by his Solicitor, who had not witnessed the signing, but put his Name to it from a Knowledge of the Petitioner’s Handwriting.

It was objected that the general Order of the 11<sup>th</sup> August, 1809, had not been complied with, and that the Petition must be dismissed.

*The Lord CHANCELLOR*

Thought the Spirit of the Order had been complied with; its Object was, to have the Pledge and Responsibility of a Solicitor of the Court, to the Proprietors of the Application.

can be no Lien on the Commission and Proceedings, that they are always ordered to be delivered up with Copies.

LINCOLN’S  
INN HALL.  
Aug. 1814.

*Ex parte* REID.—In the Matter of BLAND.

A joint  
Commission  
against *A.*  
and *B.* *A.*  
being a dormant Partner.

*BLAND* and *Satterwaite* were in Partnership together, the latter being a dormant Partner. A joint Commission issued against them. *Bland’s* separate Estate was very considerable: the joint Creditors therefor availing themselves of their Right, either to resort to the joint Estate, or to the separate Estate of *B.*, the joint Creditors resorted to the separate Estate of *B.*, thereby diminishing that separate Estate, and exonerating the joint Estate of *A.* and *B.*, so as to produce a Surplus of it.

Held, that the separate Creditors of *B.* had a Lien upon that Surplus, to the Extent which their Funds had been diminished by the Resort of the joint Creditors.

visi

visible and the dormant Partner, or to the visible Partner only, adopted the latter Alternative, and proved their Debts against *Bland's* separate Estate. The Consequence of this was, that *Bland's* separate Estate, which would have sufficed for the Payment of all the separate Creditors in full, was by the Access of the joint Creditors, apportioned in a Dividend of seven Shillings in the Pound: while the joint Estate of *Bland* and *Satterwaite*, exonerated of its proper Claimants, produced a Surplus.

1814.  
*Ex parte*  
REID.—In  
the Matter  
of *BLAND*.

*Bland's* separate Creditors therefore by this Petition prayed, that the Surplus of the joint Estate might be considered as his separate Estate, and might be distributed amongst them accordingly.

Mr. Leach and Mr. Pepys supported the Application. The Principle upon which it is founded is simply this.—*Bland's* Estate has, upon the Partnership Account, borne more than its Proportion: *Satterwaite's* less. If both Parties were solvent, the one so in Advance would be entitled *pro tanto*, to Credit in Account and to Payment against the other. How is this affected by the Bankruptcy? The Principle has been recognized in *Ex parte King* (a).

Mr. Cullen opposed it. The Application is unprecedented, and founded upon a supposed Equity, in Contravention of the legal Right of the Parties. The joint Creditors at and before the Bankruptcy were either, the joint Creditors of *Bland* and *Satterwaite*, or the separate Creditors of *Bland*, as they should elect. They constituted themselves separate Creditors. *Bland's* separate Estate, therefore, has been regularly exhausted in their Satisfaction. The Surplus of the joint Estate must fol-

(a) 1 Vol. p. 212. 17 Ves. 115.

1814.

*Ex parte*  
**REID.**—In  
 the Matter  
 of **BLAND.**

low its usual Destination. Taking the Accounts as at the Bankruptcy, *Bland's* Moiety of it has become his separate Estate, applicable to the Demands of his separate Creditors : the other Moiety is in like Manner applicable to the separate Creditors of *Satterwaite*.

*The Lord CHANCELLOR*

Thought, that the Petitioners were entitled to what they prayed : and ordered, that it should be referred to the Commissioners, to take the Account between *Bland* and *Satterwaite*, and to ascertain the Shares they were respectively entitled to in the Surplus of the joint Estate. The Commissioners in taking the Account, to give Credit to *Bland*, for the Amount of Dividends paid out of his separate Estate, to the joint Creditors who elected to come in against it. The Commissioners to state the Amount of such Dividends : and all further Directions were reserved.

LINCOLN'S  
 INN HALL.  
 Aug. 1814.

*Ex parte* **SUTTON.**—In the Matter of **CHANGEUR.**

Parol  
 Agreement,  
 although with  
 part Performance,  
 notwithstanding  
 49 Geo. III.  
 c. 121. s. 19.

**P**ETITION that Assignees might elect or reject an Agreement for a Lease entered into with the Bankrupt. It was merely a parol Agreement, strengthened, however, by divers Acts of part Performance,

*The Lord CHANCELLOR*

Was of Opinion, that a parol Agreement, although brought within the Principle upon which a Court of Equity would decree a specific Performance, upon Acts of part Performance, was not an Agreement within the Intent of the 49 Geo. III. c. 121. s. 19.

*Ex parte*

LINCOLN'S  
INN HALL.  
Aug. 1814.

*Ex parte* MARTIN.—In the Matter of FOWLER.

**S**HARPE and Sons, at their Bankruptcy in the Month of October 1812, were indebted to the Petitioners their Bankers, in the Sum of £4000, covered, however, by the Deposit of various Bills and Notes, as collateral Securities: amongst others, by a Bill of Exchange dated the 9th of July 1812, drawn by Sharpe and Sons on and accepted by the Bankrupts Fowler and Anstie, for the Accommodation of the said Messrs. Sharpe and Sons, for the Sum of £2450, payable to their Order, at six Months after Date, and indorsed by them to the Petitioners. This Bill did not become due until after the Bankruptcy of the Acceptors Fowler and Anstie, on the 26th of November 1812, at which Time the Petitioners had received the greatest Part of their Debt, by Means of the other Securities deposited with them.

On the 12th June 1813, the Petitioners proved the Balance of their Debt, amounting to the Sum of £56: 4s.: 8d., under the Commission against Sharpe and Sons; and on the 12th they afterwards received upon the

A Depositary has a Right to avail himself of his Pledge to its utmost Extent in Point of Proof; and to his fullest and most complete Indemnity at the Time of proving.

Thus a Creditor, with whom a Bill of Exchange had been deposited as a Security, first proves his Debt against the Estate of the Drawer, his principal Debtor; and

thereby, and by other Means, reduces his Debt to £14. Subsequent to that, the Acceptor becomes bankrupt: under his Commission he was held to be entitled to prove, not only the £14, but all the Interest upon his Debt at the Time of making that Proof, to the complete Liquidation of the Account, in respect of which he held the Bill as a Security.

Securities

1814.

*Ex parte*  
MARTIN.—

In the  
Matter of  
FOWLER.

Securities a further Sum of £42 : 8*d.*, which being deducted from the Sum of £56 : 4*s.* : 8*d.* diminished their Debt to the Sum of £14 : 4*s.*

On the 12th *March* 1814, the Day appointed for the making of a Dividend under the Commission against *Fowler* and *Anstie*, the Petitioners attended to prove their Debt on the Bill of Exchange for £2450, in order to cover themselves to the full Extent of their Demand against *Sharpe* and Sons. This Demand they stated as follows:—Balance upon the Principal of their Debt £14 : 4*s.* Interest up to the 12th of *March* 1814, £86. The Assignees of *Fowler* and *Anstie*, on the other Hand, insisted that the Petitioners were only entitled to be paid the £14 : 4*s.*, and not the further Sum of £86 for Interest up to the Time of making the Dividend; and the Commissioners coincided in that Opinion. The Petitioners were therefore admitted to prove that Debt: the Dividends upon it not to exceed the Sum of £14 : 4*s.*

A Dividend of one Shilling in the Pound was declared, and paid to the Petitioners, in Amount to the Sum of £14 : 4*s.* They still however insisted upon their Right to be fully covered in Respect of the Interest, and presented the present Petition to obtain an Order for that Purpose.

The Petition, therefore, prayed that the Assignees of *Fowler* and *Anstie* might be directed to pay to the Petitioners the Sum of £86, as the Interest then remaining due to the Petitioners, in Respect of the Loan made by them to *Sharpe* and Sons, up to the Day on which the Dividend was declared: or, if the Lord Chancellor should be of Opinion that the Petitioners were not entitled to Interest up to that Time, then that the  
Assignees

Assignees might be ordered to pay the Petitioners the Sum of £38 : 15s. : 2d. as the Interest on the Loan calculated up to the Date of the Commission.

1814.  
*Ex parte*  
 MARTIN.—  
 In the  
 Matter of  
 FOWLER.

The Assignees of *Fowler* and *Anstie* insisted that the Petitioners were only entitled to charge their Estate with the Amount of Principal and Interest on their Advances to *Sharpe* and Sons, up to the Date of the Commission against them; that is to say, with the actual Balance of the Debt proved by the Petitioners under that Commission: or that at the very utmost, Interest could only be charged against the Estate of their Bankrupts, up to the Date of the Commission against them, and not beyond it.

The Petitioners insisted that they were entitled to the Principal and Interest up to the Day of the Dividend, before which Time their Debt was unliquidated; that the Bill of Exchange in Question had been deposited with them as a Security for Principal and Interest, and that they were entitled to avail themselves of the Security deposited with them for their complete and full Indemnity.

Mr. *Montague* in Support of the Petition, admitted that a Proof against *Fowler* and *Anstie* for a Debt due from them could not include Interest beyond the Date of the Commission; but *Fowler* and *Anstie* stood in the Nature of a Surety, bound to the Extent of their Acceptance, to indemnify the Depositary against the Default of the Principal, and in that View the Holder, as the Person to be indemnified, was entitled to retain his Proof and the Dividends upon it till his complete Indemnity was accomplished.

Mr. *Cooke* opposed it. The Petitioners were the Holders of the Bill in Question, not under any Discount  
 of

1814.  
*Ex parte*  
**MARTIN.**—  
 In the  
**Matter of**  
**FOWLER.**

of it, but by a Deposit in the Nature of a Mortgage; when therefore the Holders proved their Balance against *Sharpe* and Sons, the State of the Account between them must have been then ascertained; the Balance must have been then struck; and for that Balance only the Bill would remain as a Security. It is precisely the Case of a Mortgagee proving against a Mortgagor the Interest upon the Mortgage; the Purpose of the Pledge was to satisfy the Petitioners in Respect of their Demand against *Sharpe* and Sons; the Extent of that Demand was ascertained at *Sharpe* and Son's Bankruptcy, and in the Satisfaction of that the Object of the Pledge would be answered. But supposing any Distinction can be taken between the Pledge of a Bill of Exchange and a Mortgage, even in that View, Interest could not be claimed beyond the Bankruptcy of *Fowler* and *Anstie*. Interest, except in the Case of a Surplus, never proceeds beyond the Date of a Commission.

*The Lord* CHANCELLOR

Made the Order for the Payment of the Debt and Interest up to the Day of the Dividend; but as the Case was new and untouched by any Decision, his Lordship intimated his Willingness to rehear the Petition, if the Respondents should think proper.

*Ex parte*

*Eu parte* BLAND.—In the Matter of STRICK-  
LAND.

LINCOLN'S  
INN HALL.  
Aug. 1814.

**D**ICKENSON sold to *Strickland* a Vessel called the *Lord Rodney*. The Bill of Sale was dated on the 28th of *November* 1809; but the Entry at the Custom House was not made, nor *Strickland's* Name inserted in the Registry till the 16th of *February* 1810. The Petitioner had, between the 28th of *November* 1809, and the 16th of *February* 1810, done certain Repairs in the Vessel, amounting to the Sum of £3235, which Repair had been ordered by one *John Kinnear*, under certain Contracts in Writing, which are noticed in the Judgment. Subsequent to the 16th of *February* 1810, he had done further Repairs to the Amount of £39 : 10s., ordered by the Captain of the Vessel. *Strickland* was frequently at the Vessel superintending the Work; and when it was completed, sold her for a Sum covering the prime Cost and the Repairs, and which Sum formed the Bulk of his Estate. The Petitioner, upon the Bankruptcy of *Strickland*, applied to prove the Sum of £634, the Balance of the Sum of £3235; and also the Sum of £39 : 10s. The Commissioners refused to admit the Proof, on the Ground, that the Repairs were performed on the Credit of *Kinnear*; and that *Strickland* was merely a Mortgagee.

A Ship, while the Possession of it is retained, is specifically chargeable in Respect of the Expense incurred in repairing it: but the Possession parted with, the Lien is lost.

For the Repair of a Ship, the Creditor has the Liability of the Master, who gives the Order, and also of the Owners, of whom the Master is considered as

the Agent, unless such Liability be excluded, as to the one or the other of them, by the express Terms of the Contract.

The



1614.

*Ex parte*

BLAND.—

In the Matter of  
STRICKLAND.

The Petition, stating the above Circumstances, prayed that the Petitioner might call a Meeting of the Commissioners, and prove the two Sums of £634 and £39:10s.

Mr. *Hart* and Mr. *Montague* in Support of the Petition, contended that from his Interest in the Vessel, or from his Conduct in superintending the Repairs, a Liability had arisen against *Strickland*, or that, independently of the Question of Responsibility as Owner, as *Strickland* had sold the Vessel for a Sum of Money, including the original Cost, and the Amount of these Repairs, and which Sum principally formed his Estate, he might equitably be considered as having received their Amount for the Use of the Petitioner.

Mr. *Leach* and Mr. *Bell*, *contra*. The Petitioner never treated *Strickland* as his Debtor either in his Books or in the Bill of Parcels, and it is true he debited the Owners; but up to the Time when the Sum of £634 attached, *Strickland* was not an Owner.

*The Lord CHANCELLOR.*

The Principle which regulates the present Application I find accurately laid down by Mr. *Abbott* (a). Where the Repairs are executed in a Port in this Country, the Vessel, till parted with, is specifically chargeable with their Amount; but the Lien is lost with the Possession. Where the Repairs are ordered by the Master, he, in the first Place, incurs a personal Liability; and considering him in general as the Servant or Agent of the Owners, in the Employment and Management of the Ship, they also become responsible for his Orders, unless they are expressly excluded by the Terms of the Contract. The same

(a) On Shipping, 134.

Observation

Observation applies to the Case where a Part Owner gives the Order; the Liability attaches against them all, unless it be expressly provided against.

1814.

*Ex parte*

BLAND.—

In the Matter of  
STRICKLAND.

The Contracts which have been produced are three. The first Contract is dated the 4th *December*, 1809, and is entered into, not with the Master or with any Person representing himself to be either Owner or Part Owner. *Bland* merely agrees with *Kinnear* to execute the Repair therein particularly detailed in a workmanlike Manner, to the Satisfaction of the Owners, for the Sum of £1693; the Wages of the Workmen to be paid weekly; the Remainder by Bills on *London*. The next Contract is dated the 8th of *December*, 1809, and purports to be made with *John Kinnear*, of *Liverpool*, Merchant, without one Word in it as to the Satisfaction of the Owners, or any Allusion to them. The same Observation applies to the last Contract of the 30th *January*, 1810; it is made with *Kinnear*, who agrees to pay the Wages weekly, the Balance by Bills on *London*. That Credit has been given to *Kinnear* will not exclude the Resort to the Owners, unless it has been given under Circumstances distinctly raising an Engagement so to be excluded.

What then are the other Circumstances of this Case?

It is in the first Place material to observe, that although the Assignment was made to *Strickland* in *November*, 1809, he did not become the registered Owner till *February*, 1810. Till that Time therefore the complete Ownership had not attached. *Strickland*, it is alleged, was considered to be the Owner; and frequently attended at the Dock-yard, and inspected the Repairs; but it does not appear that any Conversation on the Subject ever passed between him and the Petitioner. The Accounts delivered to *Kinnear* were made out as to "the Owners  
of

1814.

*Ex parte*

BLAND.—  
In the Matter of  
STRICKLAND.

of Ship *Lord Rodney*," with a correspondent Entry in the Books of the Petitioner.

Under these Circumstances how can I say that *Strickland* was liable for any Part of this Work, done before his Title as Owner was completed. His Liability can only arise out of his Character as Owner, or an Engagement either express or from the Circumstances of his Conduct. The only Way of disposing of it, is by directing an Action to try whether *Strickland* was indebted in any and what Sum of Money for the Repairs of the Ship at the Time of the Bankruptcy.

As to the £ 32 : 14s. : 5d. for Work done after the 16th February, 1810, by Order of the Captain, *Strickland* at that Time was the registered Owner, and as such liable for the Orders of the Captain as his Agent, unless expressly excluded. With Respect to that Part of the Demand therefore there is no Difficulty. The Proof must be admitted for that, and the Action confined to the Residue.

Repairs and Furnishings were done at *Hull* to a *Greenock* Ship, by Order of the Agents of the Owner, at the Instance and under the Direction of the Master. The Account was made out to "Captain *Cowan* (the Master) and Owners of Ship *Jeanie*," attested by *Cowan*, and addressed to the Agents for Payment. Payment was not demanded for some Months. In the mean Time the Owner pays the Agents for the Repairs. The Agents

become embarrassed in their Circumstances, upon which those who did the Repairs apply for Payment to the Owner. Held that the Owner was liable; for he could be discharged only by positive Agreement, or by necessary Inference, that those who did the Repairs had abandoned that Security.

*Stewart* Appellant—*Hall* and others Respondents. 2 Dow's Reports upon Appeals and Writs of Error, 29.

*Ex parte*

*Ex parte* HOLMES.

LINCOLN'S  
INN HALL,  
Aug. 1814.

**T**HIS was the Petition of the Bankrupt, and it prayed that the Assignees might be directed to pay in the Sum of £195, as the Allowance out of his Estate, provided for according to the Extent of its Solvency, by 5 Geo. II. c. 30. s. 7.

A Bankrupt paying twenty Shillings out of his separate Estate is not entitled to his Allowance against the Right which his joint Creditors have to the Surplus.

He had been one of a Partnership. A separate Commission issued against him; his Partner being bankrupt under another Commission. His separate Estate produced £2288. The Debts proved against it amounted to £137.

An Order had been made by the Lord Chancellor, that the Assignees should, out of the Money and Effects in their Hands, arising from the separate Estate of the Bankrupt, pay the remaining Costs and Charges incidental to the Commission; and in the next Place should pay the separate Debts which had been proved: and it was ordered, that the Balance of Money or Effects, which should remain in the Hands of the Assignees, after making the Payments aforesaid, should constitute Part of the joint Estate of the Petitioner, and be paid into the Bank of England, in the Names of the Assignees, on Account of the joint Estate.

A Balance of £1950 was under that Order carried to the Credit of the joint Estate.

The separate Creditors were paid in full. The Petitioner

1814.

*Ex parte*  
HOLMES.

tioner having obtained his Certificate, contended that he was entitled to an Allowance of £10 per Cent., not exceeding in the Whole £300, his Estate having been sufficient for the Payment of fifteen Shillings in the Pound as required by the Statute.

Mr. *Leach* in Support of the Petition.

Mr. *Rose* for the Assignees.

*The Lord* CHANCELLOR

Refused to make the Order, declaring his Opinion to be, that to give the Bankrupt his Allowance in this Case would be an improper Interference with the Right which the joint Creditors had to the Surplus of the separate Estate: he did not consider it to be the Converse of *Ex parte Farlow* (a).

(a) 1 Vol. p. 421.

# ABSTRACT

OF

## CONTEMPORANEOUS CASES.

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SELKRIG, *Appellant*.—DAVIES, *Respondent*.

2 *Dow's Cases* in the House of Lords, 230, 250.

March 23, 1814.

**G**ARBETT carried on Trade in *England* and *Scotland*; and amongst other Property in the latter Country, was Owner of certain Shares in the Carron Iron Works. In *March* 1782 a Commission of Bankrupt in *England* issued against him; in *April* following his Effects in *Scotland* were on his own Application sequestered; his Assignees not opposing, and one of them becoming a Trustee under it. No formal Intimation of the Assignment was given to the Carron Company; but the Assignees corresponded with the Company on the Subject, both before and after the Expiration of the Sequestration. The Appellant, as Trustee for *Fairholme's* Creditors, offered to prove his Debt under the Commission. The Proof was opposed; but a Claim for £15,000 was admitted. Before the Right to prove was disposed of, the Sequestration of 1782, not having been renewed (*a*), had expired, and the Appellant in 1798 recreated Garbett's Shares of the Carron Stock.

The Assignment under an *English* Commission of Bankrupt vests in the Assignees, and without the Necessity of Intimation, the Whole of the Bankrupt's personal Property in *Scotland*, and all subsequent Diligence, by any *Scotch* or other Creditor, is thereby precluded.

The Carron Company brought an Action of Multiple Poinding, therein raising the Question of Preference between the *English* Commission and the *Scotch* Arrestments.

The Court of Session were unanimous in Favour of the general Principle, that the *English* Assignment transferred the Whole of the Bankrupt's personal Property wherever situate, and that the subsequent

(*a*) As required by 23 *Geo. III. c. 18*, 23 *Geo. III. c. 74*.

1814.  
SELKRIG,  
Appellant.—  
DAVIES,  
Respondent.

Arrestment of 1798 was thereby barred; and pronounced an Interlocutor accordingly, from which *Selkraig* now appealed.

*Adam and Leach* argued for the Appellants, that the English Assignment did not, *ipso jure*, carry the Scotch Property, so as to exclude the subsequent Attachment, without previous Intimation: and that previous Intimation had not been given; which ought to be by Notice at the Moment, or by something equivalent.

*Romilly and Wetherell* for the Respondents, supported the Proposition that the English Commission *ipso jure* transferred all the Property wherever situate.

The Arguments and the Cases used on both Sides were principally those already given in 1 Vol. 462, *Bank of Scotland v. Culbert*.

Lord ELDON, Chancellor.

*Stein's Case* (a), lately decided, involved the general Principle. The Bank of Scotland there applied for a Sequestration of the Property in Scotland. They were met by the Assignees under the English Commission, who claimed the Whole, both Scotch and English. In that Case, the Bankrupts had executed to their Assignees, Dispositions in the Scotch Form, of the Whole, not only of their moveable but also of their heritable Property in Scotland. In the able and learned Exposition of the Grounds of Judgment there, it appears to have been taken for granted, that the English Commission imposed not only a moral but a legal Obligation on the Bankrupts, to convey their real Property in Scotland to their Assignees. But according to the English Law there was no Authority to compel a Bankrupt to convey the real Estate, and infinite Difficulty had occasionally resulted from that Circumstance. If this were a Defect, the Remedy must be applied by the Legislature. The Mode of getting at the real Property in these Cases, was for the Creditors to assign their Debts to some Individual, who proceeded against the heritable Property according to the Scotch Law; or to withhold the Certificate till the Bankrupt consented to convey. If the Judgment rested merely on the Ground, that a Bankrupt could by legal Process in England be compelled to convey his heritable Property, such a Judgment could not be supported (b); but it was at

(a) 1 Vol. 462.

(b) His Lordship here observed upon the Difficulty of applying to the Whole of the Bankrupt's Property in England and Scotland, the Commission or the Sequestration. A Difficulty arising from

their technical Peculiarities; and that a co-existing Commission and Sequestration would involve the Matter in still greater Confusion; unless the one were used for the Purpose of Distribution under the other.

## CASES IN BANKRUPTCY.

99

any State clear, that the English Commission passed the personal Property in Scotland, and all other Parts of the World.

1814,  
SELKRIG,  
Appellant,—  
DAVIES,  
Respondent.

As to the Question whether Intimation was necessary, they were to consider the Difference between the Assignment of a Debt by one Individual to another, and an Assignment of a Bankrupt's personal Property for the Use of his Creditors. To apply the Rule of Law with Respect to Intimation to the latter Case, would cut up by the Roots the Use of an English Commission in Relation to Scotch Property. Lord Meadowbank therefore in *Stein's Case* held, that this Assignment operated like the Transference by Marriage. A Marriage in England rendered the Scotch Property of the Wife her Husband's without Intimation; and such must be the Law in Cases like the present, if an English Commission were to have any Effect in Scotland. But if Intimation were necessary, it had been given in the present Case.

Independently of other Considerations, if a Scotch Creditor came in under an English Commission, he must be considered to all Intents and Purposes as an English Creditor: and the Appellant was therefore on that Ground precluded from taking Advantage of his Scotch Arrestment, by his having claimed under the English Commission.

Judgment affirmed.

MULLER and ANOTHER, Assignees of MEEK, a Bankrupt,  
against MOSS.

May 11, 1812.

1 *Macle and Selwyn*, Rep. 335. 338.

**T**ROVER for Household Furniture and Farming Stock, &c. Plea, The general Issue. A Verdict for the Plaintiffs, subject to the Opinion of the Court on the following Case.

On the 22d of November 1810, Meek agreed with the Defendant, on Payment of £9,500, to surrender to the Defendant, his Heirs, &c.

Where, by Agreement between B. and the Defendant, B. agreed, on Payment to him of a Sum certain, to convey to the Defendant a Dwelling House,

and to deliver Possession of all the Household Furniture and Stock, and that after formal Possession delivered to the Defendant, B. should be allowed to remain in Possession for three Months without paying Rent; which Agreement was notorious in the Neighbourhood, and the Money was paid by the Defendant, and a formal Delivery made to him, and B. afterwards left in Possession, according to the Agreement, who became bankrupt whilst he so remained in Possession, and before the Expiration of the three Months; held, that this was not a Possession by the Bankrupt within the Statute 21 Jac. 1. c. 19. s. 11.

H 2

a Dwelling



1812.  
MÜLLER and  
Another, Assignees of  
MEEK, a Bankrupt,  
against MOSS.

a Dwelling House and Lands then in Meek's Possession, and all Household Furniture and Stock; and it was agreed that Meek should be allowed to remain in Possession for three Months, without payment of Rent. The Transfer was notorious in the Neighbourhood. On the 27th of the same Month of November, the Defendant by an Agent took Possession of the purchased Property, and in Pursuance of Agreement, left Meek in Possession. Meek continued in Possession during his Bankruptcy, which took Place within the three Months, on 24th December following, when the Defendant sent a Person to Possession on his Behalf, and refused to deliver it to the Assignees. The Question for the Opinion of the Court is, whether the Plaintiffs are entitled to recover, under the Statute 21 Jac. 1. c. 19. s. 11.

Lord ELLENBOROUGH, C.J.—It was a Part of the Contract that the Bankrupt should remain in Possession during the three Months; therefore, during that Period, he was in of his own Right, as Owner and not by Permission of the true Owner; and as to his being reputed Owner, the Case states that the Transfer was notorious. No Person was deceived; besides, reputed Ownership is a Fact which ought to have been found to raise the Question at all.

*Per Curiam*, Postea to the Plaintiff.

May 11, 1812.

#### BAYLEY v. SCHOFIELD.

1 Meule and Selwyn, Rep. 338, 345.

Where a Trader, upon being arrested for a Debt of 186l. escaped from the Officer, and hid into the House of

**THIS** was an Action for Money had and received: Verdict for the Plaintiff for £425, subject to the Opinion of the Court on the following Case.

another, and was pursued by the Officer, and inquired for at the House, but was denied, and the Door kept fast; and whilst he remained there declared, that he did it for Fear of other Creditors; and when it was dark returned home, and gave Directions to deny him to any one that called, and continued nearly a Month in his Bedchamber: Held, that this constituted one or more Act or Acts of Bankruptcy under the Words of the Statute, "beginning to keep House" or "otherwise absenting himself;" and a Creditor of the Bankrupt, who had sued out a Writ against him, and without proceeding upon it, afterwards received from him a Bill of Exchange, in Part Payment of his Debt, after being apprized that there had been a Meeting of his Creditors, and that the Bankrupt's Affairs at that Time were only capable of paying the Demands of his Creditors by Instalments, although he was assured by the Bankrupt's Agent that they would come round, was liable to refund the Proceeds of such Bill to the Assignees of the Bankrupt, as a Payment not in the usual Course of Trade, and before Notice of his Insolvency.

On the 9th of August, *Luckraft*, a Trader, at *Plymouth*, being then indebted to the Defendants, upon a dishonoured Bill of Exchange, for £562: 12s: 9d., and to several other Persons, was arrested at the Suit of one *Henry Wells*, but escaped from the Officer into the House of another Person, and was there denied to the Officer, who pursued and inquired for him, and the Door being kept fast, the Officer departed, and the Money for which he was so arrested was paid within three or four Hours after. Afterwards, on the same Day, *Luckraft* was seen by a Person, in a two Pair of Stairs Room, at the House whither he fled, to whom he said that he had been arrested on that Day, and the Debt was paid; but that he remained there for Fear of being opposed by some other Creditors. When it was dark, he went home to his own House, and gave Directions to deny him to any Body that called; and from that Time he continued nearly a Month in his Bedchamber, except coming down on Sundays for a little Air. On the 11th of August a Commission of Bankrupt issued against him; but the Parties who used it out, deeming his Property to be more than sufficient to pay all his Debts, convened a Meeting of his Creditors on the 31st of August, when it was unanimously resolved by the Creditors present, that *Luckraft* should dispose of all his Effects, and divide the same amongst his Creditors, as the Proceeds should come to Hand. On the 29d of August, *Luckraft's* Attorney wrote a Letter to the Defendants upon the Subject of their dishonoured Draft for £562: 12s: 9d. requesting their Attendance at the Meeting of Creditors, and expressing his Opinion and Belief that *Luckraft* would pay every one 20s. in the Pound. The Defendants replied that they would sign no Deed of Trust; that if *Luckraft* could furnish them with Security, to pay his Debts in six Months, they had no Objection to wait so long; if not the Law should have its Course. *Luckraft's* Attorney replied on the 31th of September, that he was sorry the Defendants would not grant the Indulgence requested; that he pledged himself that *Luckraft* would be able to pay every one in full, and have a considerable Balance left; that he had been informed by his Agent in London, that the Defendants not only refused to receive £300 on Account, but threatened Arrest. He would therefore send them £420 by Return of Post, provided they would be content to wait three Months for the Remainder. To this the Defendants answered, that they had taken out a Writ against *Luckraft*; but that if he would remit £420 and the Costs and Officer's Charges by Return of Post, with *Luckraft's* Note for the Balance and Interest, they would accept it. *Luckraft's* Attorney replied, "I enclose a Draft for £425, which is the most I can at this Time muster; within three Months I shall have sufficient Cash to remit you the full Balance." The inclosed Bill was Part of the Produce of *Luckraft's* Estate: it was received by the Defendants on the 13th of October, and paid

1812.

BAYLEY &  
SCHOFIELD,

1822.  
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 BAYLEY v.  
 SCHOFIELD.

paid when due. At the Trial *Luckraft's* Attorney was examined, and stated, that at the Time the Bill was paid to the Defendants, he assured them that *Luckraft* was a solvent Man; that he believed him to be so. On the 10th December 1810, the former Commission of Bankruptcy issued against *Luckraft* was superseded, and another Commission dated on that Day was issued against him. The Questions for the Opinion of the Court were:—

First. Whether *Luckraft* committed an Act or Acts of Bankruptcy (a), before the Defendants received the Bill for £425. Secondly, Whether it was *bona fide* and in the ordinary Course of Trade (b) received by the Defendants of *Luckraft* before they understood or had Notice that he was become a Bankrupt, or was in insolvent Circumstances.

Lord ELLENBOROUGH, C. J.—There are two Points in this Case. First, Whether *Luckraft* committed an Act of Bankruptcy. The Facts are, that *Luckraft* was arrested; but escaped to a House, where he was denied, but not by his Orders, and therefore that Circumstance should not be pressed. He remained however in the House until dark, intending to delay his Creditors. I think this was not a departing from his Dwelling House; but that it was an absconthimself within the Words of the Statute (c). Then comes a second Act: when dark he returned Home; the next Day gave Orders to have himself denied, and there continued nearly a Month in his Chamber. The next Question is, whether the Payment by *Luckraft* was *bona fide* and in the ordinary Course of Trade, within 19 Geo. II. before the Defendants had Notice that he was in insolvent Circumstances. By insolvent Circumstances is meant that a Person is not in a Condition to pay his Debts in the ordinary Course, as Persons carrying on Trade usually do. The Letter which inclosed the Bill shews him to have been in insolvent Circumstances. It speaks of his being unable to muster a sufficient Sum, and of his having been obliged to pay every one a little, as it came to Hand. Can that Payment be in the ordinary Course, when a Man confesses he is obliged to pay by minute Portions to each of his Creditors? It is more like a Distribution under a Deed of Composition than a Payment by a Trader. I do not think the Circumstance of paying Interest weighs much on one Side or the other; it does not import Insolvency, except as far as the not paying at the proper Time may be deemed a Circumstance of Insolvency; yet it is an Ingredient to shew it not in the ordinary Course.

(a) *Collier v. Freeman*, 2 T. R. 59. *Holroyd v. Gurnea*, 1 Vol. p. 118. 2 Tenn. 178. *Dudley v. Vaughan*, 1 Campbell, N. P. C. 212. *Robertson v. Liddell, Williams v. Nunn*, 9 East, 487. 1 Tenn. 270. 1 Vol.

p. 287, in Notia.

(b) *Cahoon v. Lingard*, *Holmes v. Warrington*, *Coe v. Morgan*, 2 Bos. and Pul. 202. *Howell and Browning*, 1 East, 122.

(c) 1 Jac. 1. c. 16.

GAOZE, J.—Was of the same Opinion.

LE BLANC, J.—With Respect to the Act of Bankruptcy, there was no Evidence of any actual Denial; but a Denial is not one of the Acts of Bankruptcy enumerated in the Statute. It has indeed been received as conclusive Evidence, if unexplained, of an Act of Bankruptcy by beginning to keep House; but it is not the only Evidence by which an Act of Bankruptcy may be established. It may be proved by Evidence of his absenting himself, or of his keeping his House with Intent to delay his Creditors; as in this Case, when upon his return Home, he explained his Motives for shutting himself up in his Bedchamber. There is no Doubt therefore that an Act of Bankruptcy was committed. That brings it to the next Question: I take Insolvency, as it respects a Trader, to mean that he is not in a Situation to make his Payments as usual; and that it does not follow that he is not insolvent, because he may ultimately have a Surplus upon the winding up of his Affairs. I find great Difficulty therefore in saying that this was a Payment in the ordinary Course of Trade, and much greater Difficulty in saying that the Defendants did not know *Luckraft* to be insolvent.

1818.

BAYLEY &  
SCHOFIELD.

BAYLEY, J.—When *Luckraft* escaped from the Officer, and fled to the House of a Stranger, and there remained until dark, I consider that as an absenting within the Meaning of the Statute; when he returned home, and remained in his Bedchamber for upwards of three Weeks, that amounted to another Act of Bankruptcy. Denial to a Creditor is not essential to an Act of Bankruptcy by beginning to keep House. In many Cases indeed the Conduct of the Bankrupt is equivocal, and therefore it may be necessary to show a Denial; but where there is any other distinct and independent Act of beginning to keep House, it is not necessary to follow it up with the additional Circumstance of a Denial. In *Castell's* Bankruptcy, it was proved that the Bankrupt left the Place where he usually sat, retired into a back Room up Stairs, and drew the Curtains to prevent his being seen: and that was considered an Act of Bankruptcy. As to this being a Payment in the ordinary Course of Trade, the Object of the Statute was to protect those Persons only who received Money under Circumstances not calculated to raise Suspicion; but if any such Circumstances occur, then they receive the Money at their Peril, and are liable to refund. Insolvency means, that a Trader is not able to keep his general Days of Payment, and that he is not to be considered as solvent, because possibly his Affairs may come round.

Postea to the Plaintiff

THOMAS

May 10, 1811.

THOMAS v. RHODES.

3 Taunton's Rep. 478. 484.

A Bankrupt, who had obtained a Verdict, in an Action brought by him to try the Validity of his Commission, pending a Rule *Nisi* for a New Trial, confessed Judgment to one of his Assignees, who was the Petitioning Creditor, for a Sum of Money, in Discharge of his Debt, in Consideration of his not opposing the Bankrupt's Petition for a Supersedeas. The Court set aside the Judgment on the Bankrupt's Application.

**T**HOMAS was the Petitioning Creditor, and also one of assignees, under a Commission against Rhodes; who, dispu Bankruptcy, brought an Action against the Messenger, and a Verdict. In the following Term, a Rule *Nisi* was obtained New Trial; and pending that Rule, a Compromise took Pl an Agreement was executed between Rhodes and Thomas, with Knowledge of the other Assignee or of the Creditors, where reciting that by the Rule *Nisi*, the intended Application by l the Lord Chancellor for a Supersedeas was deferred, to obvi and other Difficulties, Rhodes and Thomas had come to an Acco that the Balance in Favour of the latter was £200, it was agr the Action should be no further prosecuted, but that the Cou should be superseded upon the Petition of Rhodes for that I and that Thomas should do every Thing in his Power to effect Supersedeas.

The Sum of £200 was secured by a Warrant of Attorney, e by Rhodes, of even Date with the Agreement, to the Object o the Defeasance was adapted and corresponded. Rhodes aft petitioned for and obtained the Supersedeas without Op Thomas having entered up Judgment and taken out Writs on t rant of Attorney, a Rule *Nisi* had been on a former Day o that the Judgment might be vacated and the Writs quashed.

Best, Serjeant, now shewed Cause. The Security, though fra as to others, is good as between the Parties; and though C might impune it, Rhodes as in *pari delicto*, and having reaped th of it, could not.

Shepherd and Pell, Serjeants, in Support of the Rule. The of the Court has been unduly resorted to, in a Transaction in Fraud, and Duress upon the Bankrupt; who, by the Statu intitled to Protection as well as the Creditors.

MANSFIELD, C. J.—It is wrong that any Man suing out a (

sion should gain an Advantage in which the Creditors do not share. The Plaintiff was the Petitioning Creditor and Assignee; it was his Duty to support the Commission; he consents to superseding it on having that Sum of £200 secured to him by Warrant of Attorney. It is fit that the Judgment and Execution should be set aside.

1811.  
THOMAS v.  
RHODES.

HEATH, J.—LAWRENCE, J. Concurred.

CHAMBER, J.—Was absent in Consequence of Indisposition.

Rule absolute.

THACKTHWAITE v. COCK.

May 20, 1811.

3 Taunton's Rep. 487. 491.

THE Plaintiff purchased 78 Pockets of Hops of Moore, and agreed with him that they should remain in his Warehouses, at the Rent of a Penny a Pocket per Week, until the Plaintiff should resell them. Before such Resale Moore became bankrupt. The Assignees refused to deliver the Hops to the Plaintiff; and he brought an Action of Trover against them. Upon the Trial it was proved to be a Custom of the Trade for Hops to be left by the Purchaser in the Merchant's Warehouse at a Rent. That the Hops in Question were exposed to the View of Customers, promiscuously with the Bankrupt's Stock, and undistinguished by any Mark, because a Mark, by drawing Attention to the Time they had been in the Market, would prejudice the Sale of them. The Plaintiff obtained a Verdict. The Defendants, in the last Term, obtained a Rule *Nisi* to set it aside and enter a Nonsuit.

A Custom, that Purchasers of Hops shall leave them upon Rent in the Hop Merchant's Warehouse for Resale, undistinguished from his Stock, will not prevent them from becoming the Property of the Hop Merchant's Assignees upon his Bankruptcy, as being in his Possession, Order, and Disposition. The Custom not being clear, distinct, and precise enough to enable others to know that the Hops so left were not the Property of the Possessor.

Shepherd and Best, Serjeants, now shewed Cause. They contended that Moore was a mere Warehouse-keeper of the Goods, the Possession of which, the Custom of the Trade being known, could not induce others to give him Credit, in Reliance that they were his own, and occasion the Mischief the Act was intended to obviate. *Horn v. Baker* (a).

Lew, Serjeant, *contra*, relied upon the obvious Intention and Construction of the Act, and distinguished this from the Case cited.

(a) 9 East, R. 215.

1811.

THACK-

THWAITE &amp; COCK.

MANSFIELD, C. J. delivered the Opinion of the Court.

Though the Custom of a Trade may have the Effect referred to in *Horn v. Baker* (a), it must be much more clearly proved than this is. There is not here such a clear, distinct, and precise Custom proved, as would enable others to see that these may not be the Hops of the Possessor. The Objection against disclosing the Owner would be obviated by having a separate Warehouse, marked as a Warehouse for Hops of the Persons who had bought them. The Verdict is wrong.

Rule absolute.

(a) *Viz.* To rebut the Presumption of Ownership arising from the Possession of Chattels.

One of the Arguments for the Plaintiff was that the Words in the Statute were, Possession, Order, and Disposition; it was therefore necessary, in order to bring the Case within the Statute, that those three Circumstances should combine; but that *Moore* only had the Possession. *Mansfield C. J.* in the Course of the Argument expressed his Opinion decidedly against such a Construction. *Lawrence, J.* observed, that *Horn v. Baker* chiefly respected Utensils, in the Nature of Pictures; not extending

to loose Vessels. That in the Counties of *Nottingham* and *Leicester* it was common for the Working Hosiers to hire Stocking Frames, which they were unable to purchase, and which came within the Reason of Job Camlages, Job Horses, and the like. *Chambers J.* observed, that in *Horn v. Baker*, two out of three former Owners had continued in Possession, the third having retired; which the Court thought sufficient to give the Reputation of Ownership.

May 27, 1811.

HOWARD v. RAMSBOTTOM.

3 Taunton's Rep. 526. 530.

The Notice of Intention to dispute a Bankruptcy may be served on an Assignee by Delivery to his Attorney; but not by Delivery to the Maid Servant of the Assignee at his Dwelling House.

**T**ROVER by a Bankrupt against his Assignee. Upon the Trial of the Action, the Notice of the Plaintiff's Intention to dispute the Commission was proved: first, by Delivery of it to a Maid Servant at the Defendant's House; and secondly, by Service on the Defendant's Attorney. It was objected, that the Notice ought to have been served on the Defendant personally; and the Jury found a Verdict for the Plaintiff, subject to the Point.

A Rule *Nisi* having been obtained by *Shepherd, Serjeant*, to set aside the Verdict and enter a Nonsuit; and Cause shewn against it by *Best* and *Marshall, Serjeants*—

MANSFIELD,

MANUEL, C. J. delivered the Opinion of the Court.

A Notice left at a Man's House with a Maid Servant may very possibly never find its Way to him; wherefore we certainly should say, that that Service was not sufficient. Then the Question is, as to the Notice given to the Attorney. The Act in its wording is like the Statute of Set Off. Of the Time of pleading and joining Issue, Dates to which both Acts (a) refer, depending as they do on the Progress of the Proceedings, the Party knows nothing: he leaves it to his Attorney. Therefore the Notice to the Attorney is the best that can be given for practical Purposes.

Rule discharged.

1811.

HOWARD v.  
RAMSBOTTOM.

(a) The Statute of Set Off, 2 Geo. II. c. 23. s. 12, points out under what Circumstances "one Debt may be set against the other, so as at the Time of pleading the general Issue, Notice shall be given," &c.; and the Practice is to serve Notice on the Attorney. The 49 Geo. III. c. 121. s. 16, directs, that the Commission and Proceedings shall be Evidence of the Debt, Trading, and Bankruptcy, "unless the other Party, if Defendant, at the Time of pleading, and if Plaintiff, before Issue joined, give Notice in Writing to the Assignee, that he intends to dispute such Matters." Defendant permitted to withdraw Plea, and plead *de novo*, giving Notice. *Barnes v. Gould*, 1 Vol. p. 123. Similar Practice, in Equity as to a Rejoinder. *Bark v. Wigam*, 1 Ves. and Bennet, p. 231.

BEAUCHAMP v. TOMKINS.

July 7, 1810.

3 Taunton's Rep. 141. 145.

**SEMPLE**, that Bankruptcy and Certificate is not a Ground of Discharge of a Prisoner in Custody, under a *Capias ullegatum*, in *Meane Process*.

*Ex parte* GARDNER.

December 22, 1812.

1 Ves. and Bennet, at. 78.

**O**F the 18th of November 1812, *London and Child* dissolved their Partnership. On the 26th of November, separate Commissions were taken out by joint Creditors against Persons who had just ceased to be Partners, and who had very few separate Debt, unsecured. Witness to Act of Bankruptcy ordered to attend Commissioners and prove, under Penalty of Costs for Disobedience.

issued



1812.

*Ex parte*  
GARDNER.

issued against each of them, upon the Petitions, of *Maxwell*.  
Creditor. Their separate Debts were inconsiderable; the  
Debts above £5000. On the 4th of *December*, a joint Commission  
taken out by another joint Creditor; and this Petition pre-  
supersedes the separate ones.

*The Lord Chancellor.*

The Effect of these separate Commissions is, that every jo-  
ditor, except *Maxwell*, will be excluded; and most unreason-  
not one separate Creditor has appeared. The only Hesitation  
in disposing of them is, that it is premature, until the Bank-  
declared under the joint Commission (a). But I shall order  
Attendance, and if he does not attend, I will make him pay th  
of not attending (b).

(a) *Wells*, who proved the Acts of Bank- the joint Commission had not  
ruptcy under the separate Commissions, cleared.  
having refused to prove them under the (b) *Ex parte Jones*, 1 Vol. 20.  
joint Commission; the Bankruptcy under *Lund*, 6 Ves. 781. *Ex parte Higgins*.

*Ex parte TRIGWELL.*

1 *Ves.* and *Beames*, 348.

COMMISSION of Bankrupt which had not been opened  
ceded with the Consent of the Petitioning Creditor.

*Monday, Feb. 8,*  
1812.

RUMSEY, Assignee, &c. v. GEORGE.

1 *Maule and Selwyn*, 176. 181.

To sustain a Com-  
mission upon a Debt  
due to the Wife *dam*  
*sola*; she must be Pe-  
titioning Creditor  
jointly with her  
Husband.

TROVER for Goods the Property of the Bankrupt. The  
was nonsuited (with Liberty to move to set aside the  
and enter a Verdict), upon an Objection to the Petitioning C-  
Debt, viz. a Debt due to his Wife, *dam sola*, and sworn to by t

tioning Creditor alone, as "for Money lent by the Deponent and his Wife, previously to her Marriage" (a).

*Pell, Serjeant, and W. E. Taunton*, shewed Cause against the Rule nisi, upon the Principle, that the Wife must be joined with the Husband in all Actions for Debts, due to her *dum sola* (b). So where a Debt is due to the Wife as Administratrix or Executrix, the Husband cannot alone sue out Commission (c). That the legal Debt was due to the Husband and Wife, and unless reduced into Possession by him would have survived to her.

*Lees, Serjeant, and Richardson, contra*, distinguished this from the Case of a Debt due in *outré droit* to the Wife, as Administratrix or Executrix: here the Husband claims the Debt due to the Wife, *proprio jure*; and may apply it to his own Use. A *Feme Covert* cannot give a Bond, therefore cannot be a Petitioning Creditor.

*Lord ELLENBOROUGH, C. J.*—It must be a legal Debt to support a Commission of Bankruptcy: is this legally the Debt of the Husband? and can he, under a Statute, which requires him to make Affidavit of the Truth and Reality of his Debt, swear that this is his Debt? I think not. I form my Opinion on a distinct Ground, that this was not the Debt of the Husband, but of the Wife. The Law does not consider it as his absolutely, but only potentially so, provided he reduce it into Possession, during the Coverture.

*LE BLANC, J.*—The Argument that the Wife could not give a Bond would hold equally where the Wife was Executrix or Administratrix. I do not see, therefore, that that Circumstance will prevent the Husband and Wife from being Petitioning Creditors.

*BAILLY, J.* Concurred.

Rule discharged.

(a) It was proved that a Sum of 25*l.* had also been lent by the Husband, and that after the Marriage, Application was made for Payment of the Whole, and a Promise by the Debtor to pay it. It was therefore contended for the Plaintiff, that here was a Promise, in Consideration of Forbearance, giving the Husband alone a Right of Action. *Lord Ellenborough*. "A Consideration of Forbearance may support a Pro-

mise to the Husband; but it cannot make the Wife's Debt absolutely his."

(b) *Fenner v. Plashett, Moor*, 423, 1 *Ref.* abrid. P. 247. R. Pl. 3. *Gawforth v. Bradley*, 2 *Ves.* 676. *Bul. N. P.* 179. *Milner v. Milner*, 3 T. R. 631.

(c) *Ex parte Staples, Moot v. Winton*, 2 *Mood.* 129, abrid. 67, Pl. 16. *Ex parte Hilliard*, 2 *Ves.* 467. *Medlicott's Case*, Str. 599. 2 *Ves.* 707, and *Co. Lit.* 251, B.

1813.

RUMSEY,  
Assignee, &c. v.  
GEORGE.

Tuesday, Feb. 9,  
1812.

### SLAUGHTER against CHEYNE and BRYANT.

1 *Macle and Selwyn*, 182, 183.

A Deed of Composition, embracing all the Creditors, although some did not come in under it, will confine the Operation of the Certificate under a subsequent Bankruptcy to the Protection of the Bankrupt's Person only, and not of his future Effects.

**BRYANT** entered into and executed a Deed of Composition, embracing in its Terms, *all his Creditors*. Many of them came in but some refusing, sued him, and were paid. He afterwards became bankrupt, and obtained his Certificate. This was a Motion to set aside an Execution, levied upon Goods, obtained by Bryant after his Certificate, upon the Authority of *Norton and Shakespeare (a)*, that as his Creditors not having come in, this was not a compounding with the 5 Geo. II. c. 20. s. 6.

*Lord ELLENBOROUGH, C. J.*—The Defendant here, as far as in him lies, has compounded with all his Creditors of every Description. The Case cited refers to this very Distinction.

*Per Curiam*,

Rule refused.

(a) 16 *Ess.* 622. 1 Vol. 567.

Nov. 28, 1811.

### COLES v. F. WRIGHT.

4 *Taunton*, 198, 199.

A Trader in Prison employed an Auctioneer to sell Goods, who sent him the Proceeds by the Defendant. The Trader became bankrupt by lying two Months in Prison. Held that the Assignees could not recover from the Defendant, who was a mere Money Bearer, the Money he had received and paid over.

**MANSFIELD, C. J. (a).**

This was an Action brought by the Plaintiff, as Assignee the Effects of *Samuel Wright*, against the Defendant, to recover Money alleged to be had and received by the Defendant, to the Plaintiff Use. The Ground of the Action is, that *Samuel Wright* the Bankrupt, had been committed to Prison; and after he had been committed to Prison, he employed an Auctioneer to sell certain Goods who delivered £79, the Money produced by the Sale, to the Defendant, to be carried to *S. Wright*: *S. Wright* received it, and paid away Part of it; and it does not appear what he did with the Rest. It is said the Assignees are entitled to recover, because *S. Wright*

(a) The Judgment comprehends all the Facts of the Case.

because

became a Bankrupt by continuing two Months in Prison. Upon the Trial the Defence was, that the Defendant received the Money merely as a Messenger or Carrier between the one Party and the other, and that having paid it over he was not liable. We find no Case in which this Doctrine of Relation to an Act of Bankruptcy has been carried so far, as to charge a Man with Money received for a Trader lying in Prison before he became bankrupt. There was Evidence that the Defendant knew he was in Prison. There was also Evidence of a Meeting of Creditors to consider the State of *S. Wright's* Circumstances. According to the decided Cases, the Action might be brought against the Auctioneer (a); but it seems monstrous that one who takes Money as a Messenger or Bearer should be so liable. No Case goes that Length, and the Doctrine of Relation to the Act of Bankruptcy is in all Cases extremely hard, and is not to be carried farther than we are compelled to carry it, therefore we think that the Defendant is not liable to this Action, and the Rule *Nisi* to enter a Nonsuit must be made

Absolute.

(a) *Vide* Stat. 1 Jac. 1: c. 15, *Coles v. Robins*, 1 Vol. p. 225, 3 Camp. N. P. Cases, 123.

1813.

COLES v.  
P. WRIGHT.

BAXTER v. NICHOLS.

July 2, 1811.

4 Taunton, 90. 93.

THE Defendant, who was Surety, had, with three others, jointly and severally granted by Deed to the Plaintiff an Annuity, and jointly and severally covenanted for the Payment, which was further secured by a Warrant of Attorney, to confess joint and several Judgments. A joint Judgment upon the Covenant had been entered up against the four, and Execution had issued, and a Levy had been made upon the Goods of *Nichols*, for whom *Vaughan*, Serjeant, had on a former Day in this Term obtained a Rule *Nisi*, to set aside the Execution, Judgment, and Warrant of Attorney, upon Affidavit, which stated, that since the Grant of the Annuity, the Defendant *Nichols* had become a Bankrupt, and obtained his Certificate, the Consequence of which was conceived to be, that under the Statute 49 Geo. III. c. 121, s. 17, the Annuity was vacated, and all the Securities had become void.

The Bankruptcy and Certificate of one of several joint Grantors of and Covenantors for Payment of an Annuity discharges the Bankrupt, but not the other Parties.

*Leu*, Serjeant, showed Cause against the Rule. He contended that a Surety

1811.

BAXTER v.  
NICHOLS.

a Surety was not within the Clause. That this Clause would not put an End to the Suretyship, because, since the Covenant was joint, it had that Effect, it must also put an End to the Covenant and Annuity altogether, and would discharge the Principal as well as the Surety, which could never have been intended. The Court cannot hold the Annuity void as against this Defendant without holding void as to all.

MANSFIELD, C. J.—Saw no Reason why the Plaintiff might not proceed on the joint Judgment against the other three, though the fourth was discharged by Bankruptcy. The *feri facias*, which was against four, was therefore not to be set aside, except as far as related to this particular Man: as to him the Rule must be absolute—*pro tunc*

CHAMBERLAIN, J.—The Act is very defective; it makes no Distinction between Principal and Surety. The Object of this Clause was merely to discharge the Bankrupt and his future Effects; but the Rule which is pronounced will not prevent the Plaintiff from proceeding against the other three, as he might otherwise have done.

Rule absolute to set aside the Levy.

Nov. 23, 1811.

SARRAT and ANOTHER, Assignees, &amp;c. v. AUSTIN.

4 Taunton's Rep. 200. 208.

If two Persons exchange Acceptances, and before the Bills are mature, one of them commits an Act of Bankruptcy, there is not such a Debt due from him to the other as will sustain a Commission.

**T**ROVER by the Assignees of a Bankrupt. Verdict for the Plaintiff, with Liberty to the Defendant to move to set it aside and enter a Nonsuit, if the Court should be of Opinion, that the Petitioning Creditor's Debt was insufficient. He and the Bankrupt had drawn two Bills on each other, of precisely the same Tenor and Dates, and each had accepted the other's Bills. Before either of the Bills became due, the Bankrupt committed an Act of Bankruptcy upon which a Commission issued, founded upon the Acceptance given by the Bankrupt. Neither of the Bills was due or paid when the Action was brought.

Shepherd, Serjeant, in Support of a Rule *Nisi*, contended that there was no good and valuable Consideration for the Bill accepted by the Bankrupt; that possibly the Bankrupt Estate might be liable for both Bills; the one drawn and the one accepted by him. Although under 7 Geo. 1. the Petitioning Creditor might prove his Acceptance as  
Debt

Debt, the Proof would not be ultimately available, unless he should pay his own Acceptance (a).

**MANSFIELD, C. J.**—That Point was made and overruled in the Case of *Rolfe and Caslon* (b).

The Argument is not, that it is a contingent or conditional Debt, which cannot be barred by the Certificate; but that upon Failure of the Condition the Debt falls to the Ground, and consequently all Proceedings fall with it. There is a Distinction between Debts which can be proved under, and Debts which will sustain a Commission (c).

*Rough, Serjeant, contra*, contended that counter Acceptances are not to be looked on as in the Nature of an Indemnification, but as creating a Debt, legal and sufficient, within the Statutes 7 Geo. I. c. 31, s. 1, and 5 Geo. II. c. 30, s. 22, and the Cases upon the Subject (d).

(a) On a subsequent Day *Shepherd* said that he had been furnished with three Cases, not in Print, in which Lord *Eldon* and Lord *Loughborough*, Chancellors, had holden that a Party possessed of counter Bills shall not be permitted to prove them till he has paid his own Bill.

*Ex parte* EVERETT,

May 2, 1800,

was a Petition by the Assignees of *Dockson*, praying that they might be permitted to prove a Debt under the Commission of *Caldwell and Company*, who had accepted Bills for *Dockson*, who had given them counter Bills, which were not paid.

Lord *Loughborough* held, that they could not prove the Debt till the Bills accepted by *Dockson* had been taken up.

*Ex parte* BROWN.

A Petition to prove on a Bond, given to indemnify *Brown* against another Bond, which was given before the Bankruptcy, and the Court rejected the Application.

**Mansfield, C. J.**—That was clearly the Law, with Respect to all Indemnity Bonds, before the late Act of Parliament. It was the same with Bills before the Act 7 Geo. I.

*Ex parte* WARD.

June 28, 1794.

A Petition to be permitted to prove under a Commission of Bankrupt, on cross

Bills of Exchange. The Chancellor held, that the Petitioner not having taken up his own Bill, he could not be permitted to prove, and dismissed the Petition. In Lord *Clanricarde's Case*, 1000, 2 Ed. 203, before Lord *Thurlow*, Chancellor, Lord *Clanricarde* had given counter Bills which he had not paid. Lord *Thurlow* permitted him to prove the Bills he held; but afterwards expressed a Doubt to Lord *Eldon*, then Attorney-General, whether he had not gone too far in that.

**Mansfield, C. J.**—I should have had no Doubt, if you had not mentioned these Cases, that the Person who gave the counter Bills might prove under the Commission. The Debt is barred by the Certificate; and why? Because it might have been proved under the Bankruptcy. It is strange to say then, that it cannot be proved; either the one or the other Decision must be wrong. In Lord *Clanricarde's Case* the Lord Chancellor permitted Lord C. to prove his Bills, but staid the Dividend. That Decision therefore does not affect this Case at all, and it is directly contrary to the Cases you have just now cited.

(b) 2 Hen. Black. 570.

(c) *Hoskins v. Duferey*, 9 East. 498. *Cothay v. Murray*, 1 Camp. 334.

(d) *Rolfe v. Caslon*, 2 H. Bl. 570. *Pattison v. Banks*, 1 Camp. 540. *Chitten v. Wigham*, 2 Willson, 17.

1811.

SARRAT and An  
other, Assignees, &c.  
v. AUSTIN.

1811.  
 SARRAT and An-  
 other, Assignees, &c.  
 v. AUSTIN.

MANSFIELD, C. J. on this Day delivered the Opinion of the Court. The Question here depends entirely upon the Construction of the Statute 7 Geo. I. c. 31; for 7 Geo. I. is referred to by 5 Geo. II. c. 30, and they must be taken together as one Statute. The Preamble of this Statute speaks of the Necessity of these Instruments being rendered available, and it supposes that these Bills are given for Goods; it speaks of Purchasers of Goods, and has not the least Idea of any Bill being given where a Debt is not clearly due. In the next Section the Statute speaks of Debts due at a future Time; every Word of it supposing a Debt to be actually due. Then comes the restrictive Clause, *s. 3.* that such a Debt shall not suffice for a Petition to sue forth a Commission; then comes the Statute 5 Geo. II. c. 30, *s. 22*, which does nothing but repeal the restrictive Clause, that it shall not suffice for a Commission. This Statute does nothing for the Proof of Debts, which are in their Nature contingent. There are other Statutes which enable the Party to prove contingent Debts. This Debt is not on the Face of the Instrument contingent, but it is thus far contingent, that till the Drawer has paid his counter Bill, the Court of *Chancery* will restrain him from receiving any Dividend. Therefore though it is on the Face of the Instrument a Debt, payable at a future Time, it is in its Nature a contingent Debt. The Cases cited decide nothing on this Point: and it would be a singular Construction of these Acts, that though a Man, at the Time of taking out a Commission, is not entitled to receive a Shilling out of the Bankrupt's Estate, nor ever will receive a Shilling, unless he pay his counter Bill, he shall be able to stop the Bankrupt's Trade, and take all his Effects into his own Hands, by this, which is not improperly called a statutory Execution, in Order that they may be divided amongst all the other Creditors, though he himself is not entitled to receive any Part thereof; and as no Case has hitherto decided that the Holder of such a Bill is a Creditor, who may sue out a Commission, we are bound to decide upon Principle, that he is not such a one.

Rule absolute.

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BUSK v. WALSH and ANOTHER.

4 Taunton's Rep. 290. 293.

THE Plaintiff paid a Premium to the Defendant upon a Policy of Insurance, called a Peace or War Policy, *vis.* that Peace would be signed before a certain Day.

The

## CASES IN BANKRUPTCY.

115

The Defendant became bankrupt. Plaintiff applied to prove for his Premiums paid, and was refused by the Commissioners. BUSK v. WALSH  
and Another.

The Bankruptcy was afterwards superseded, and the Plaintiff brought an Action to recover his Premiums; the Bet then remaining undecided. He had given no Notice to the Defendant of his Intention to rescind the Contract.

The Court held, that a Person could, before the Event happened, declare his Dissent from an illegal Bet, and recover back his Premiums, and that the Claim before the Commissioners was a sufficient Declaration of such Intention.

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### RUSSEL v. SHARPE.

*May 2, 1813.*

1 *Ves. and Beames*, 500.

**A**FTER the usual Decree for an Account against Executors, one of them, the Defendant *George Sharpe*, became a Bankrupt. The Assignees, by Petition, prayed that they might be at Liberty to go before the Master, upon taking the Accounts, on Behalf of the Bankrupt's Creditors, to support his Discharge.

On Abatement by Bankruptcy of a Defendant, an Executor, after a Decree for an Account; supplemental Bill in Nature of a Bill of Revivor necessary.

The Register declined drawing up the Order, objecting that the Suit being abated by the Bankruptcy, a supplemental Bill in the Nature of a Bill of Revivor had become necessary.

*The Lord CHANCELLOR* refused to make the Order.

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### KENDALL. *Ex parte*.

*May 25, 1813.*

1 *Ves. and Beames*, 543, 544.

**T**HE usual Order for Attendance had been made upon a Petition to stay a Bankrupt's Certificate; but the Bankrupt was not served.

Bankrupt not served with a Petition to stay his Certificate, on which an Attendance had been ordered, en-

titled to his Certificate, and not bound by taking Copies of the Affidavits.



1813.

KENDALL,  
*Ex parte.**The Lord Chancellor.*

This Certificate must be allowed: it must be understood, that if a Bankrupt is not served with the Petition to stay his Certificate, upon which an Attendance is ordered on the next Day of Petitions, the Certificate shall go of course. Although he afterwards took Office Copies of the Affidavits, I will not bind him to his Prejudice by that Act.

May 19, 21, 1813.

WHITWORTH v. DAVIS.

545, 551.

Demurrer by a Bankrupt to a Bill, joining him with his Assignees in Charges and Prayer for Relief (*viz.* the specific Performance of a Contract previous to his Bankruptcy) allowed.

Distinction upon Fraud.

Whether a Bankrupt can be made a Party, merely for Discovery, and to maintain an Injunction.—*Quere?*

**D**AVIS agreed to sell certain Premises to the Plaintiff: and, the Contract remaining unexecuted, became bankrupt. The Bill filed against the Assignees and against *Davis* prayed, that the Agreement might be specifically performed, and an Injunction to restrain the Assignees from proceeding for Rent against the Plaintiff in Possession. To this Bill the Bankrupt *Davis* demurred.

Mr. *Hart* and Mr. *Cooke* (*amici curiæ*) said the Lord Chancellor had intimated that it might be necessary to make a Bankrupt a Party, in Order to enable the Plaintiff to frame the Interrogatories on which he was to be examined as a Witness; and referred for the general Doctrine to *Le Texier v. The Margravine of Anspach* (a).

*The Vice Chancellor.*

As all legal and equitable Interest in the Property devolves upon the Assignees, they are competent to sustain the Case in Point of Interest, and therefore the Bankrupt is not a necessary Party. That is expressly stated in *De Golls v. Ward* (b), in the Note to *Wyck v. Meul*.

The other Ground alleged in Support of the Bill is more questionable, *viz.* whether the Bankrupt is not a proper Party for the Purpose of Discovery: and to sustain the Injunction of his Answer affords Ground for it. Sir *Samuel Romilly* stated the Practice to be to make the Bankrupt a Party, with the View to read his Answer for the Purpose of sustaining the Injunction against his Assignees; and that receives some Authority from what Lord *Redesdale* says (c). There is certainly great Convenience in this, as all the Transaction may be

(a) 15 *Tet.* 159. (b) 3 *P. Will.* 311. N. 1. (c) Lord *Rede.* Tr. Ch. Pl. 152—2 known

known to the Bankrupt alone; the Party seeking Relief would be entirely deprived of it, as far as regards the Injunction, if a Discovery cannot be obtained from him. There is, however, a Difficulty to conceive how the Bankrupt's Answer can be read against his Assignees for the Purpose of an Injunction, when clearly it could not be read against them at the Hearing.

1812.  
WHITWORTH  
v. DAVIS.

There is one direct Authority that the Bankrupt ought not to be made a Party, even for the Purpose of Discovery, *Giffin v. Archer* (a). The Note is short, but I have inquired from the Judges who decided that Case, and find the Report of the Decision, that the Demurrer was allowed, was correct. There was another late Case, *Cooke v. March* (b), in which I understand the Demurrer was allowed; but I do not find distinctly that it was the Demurrer of the Bankrupt.

The Case standing thus upon the Authorities, how is it on Principle? The Case of *Fenton v. Hughes* (c) lays down a broad Principle, viz. that a Person who has no Interest and is a mere Witness, against whom there could be no Relief, ought not to be a Party. A Bankrupt stands in that Situation; and the Cases of Exception stated by the Lord Chancellor do not comprehend him. So in the Case of *Le Texier v. The Margravine of Anspach* (d), where the general Rule is laid down, the Case of a Bankrupt is not stated as an Exception.

The Bankrupt is within the Principle, and therefore ought not to be made a Party, even for the Purpose of Discovery. It is not however necessary to decide that in this Case. I desire not to be understood as opposing my Opinion, though formed upon a Consideration of the Principle and Authorities, to any current Opinion prevailing as to the Practice. This Bill considers the Bankrupt as having such an Interest, that Relief may be had against him, and prays Relief generally against him. He could not move for his Costs, as a Defendant against whom Discovery only is prayed; it is then perfectly clear that Relief being prayed against a Defendant, who can be a Party only for the Purpose of Discovery, he may demur. Upon that Ground, without determining the general Question, this Demurrer may be sustained.

(a) 2 *Ans.* 478, cited, *ante*, 2 *Ves. Junr.* 62.

(c) 7 *Ves.* 287.

(d) 15 *Ves.* 150.

(b) In *Chancery*, *Trin.* 1811.

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In Support of the Bill, *Glasford v. Jaffoy*, in the *Exchequer MS.*, was cited, as a Case where the Bankrupt's Answer was read against his Assignees. The Vice Chancellor observed, that in that Case, the Assignees in their Answers stated their Ignorance of the Subject, and referred the Plaintiff to the Answer of the Bankrupt.

*Rolls,*

Nov. 17, 19, 1812.

LINGARD v. BROMLEY.

1 *Ves.* and *Beamis*, 114, 118.

Contribution enforced among Assignees in Bankruptcy, to reimburse a Payment by one under an Order for a Loss occasioned by their joint Act; and the Objection that the Defendants acted only for Conformity, upon the Representation and Advice of the Plaintiff, did not prevail.

**A** Commission issued against *Ogden*; the Plaintiff and Defendant were chosen Assignees. The Commissioners, at the Instance of Mortgagees for £2324, caused the Mortgage Premises to be put up to Sale, which produced the Sum of £3400. The Assignees, conceiving that the Mortgage was invalid, declined to join in the Conveyance to the Purchaser. Upon the Petition of the Mortgagees, an Order for a Re-sale was obtained, which produced only £2820; and the Assignees were ordered to pay the Deficiency of £580, with Interest and Costs, amounting to £1139: 11s.: 9d., which Sum was paid by the Plaintiff. The Bill prayed an Account and Contribution.

The Defence was, that the Plaintiff acted principally in the Bankruptcy; the Defendants relying on his Representations and Advice and concurring only in Form.

Nov. 19.

*The Master of the ROLLS.*

Where entire Damages are recovered against several Defendant guilty of a Tort, a Court of Justice will not interfere to enforce Contribution among the Wrong-doers; but here, in the Refusal to convey, is nothing but the Non-performance of a civil Obligation. The Defence is of a Kind which a Court of Justice is very unwilling to listen to; that, having undertaken a Trust, they abdicate all Judgment of their own in the Performance of it, and did whatever the Plaintiff desired. Nothing could be more mischievous than to hold that Trustees may thus act, and avoid Responsibility by throwing the Burden upon the Person in whom they have reposed this blind Confidence. The Case is not, that they abstain merely from interfering but they enter upon the Trust; make themselves Parties to every Proceeding; give the Sanction of their Names to each Transaction; and now say, they are to be considered as total Strangers; and all that has been done is to be taken as the Act only of their Co-Trustee. This will protect them from Contribution, why would it not be sufficient to throw back the Burden upon the Plaintiff, if the Defendant had been the Persons called upon to pay in the first Instance? It is nothing to exempt them from the Liability to answer for Acts in which they joined; and to enable them to throw the whole Responsibility for those Acts upon the Plaintiff. He is, therefore, entitled Contribution, with the Costs of the Suit.

COVERL

COVERLY v. MORLEY.

Tuesday, Nov. 10.

*Est's Reports*, 16 Vol. Pages 225, 227.

THIS was an Action by the Payee against the Maker of a Promissory Note; to which the Defendant pleaded Bankruptcy. The Defendant at the Trial before Lord *Ellenborough*, C. J., put in the Commission and his Certificate. But this was shewn to be the second Commission of Bankruptcy issued against this Defendant; and the Plaintiff called the Assignee to prove, that the Bankrupt's Effects would not produce 15s. in the Pound: the Witness however said that he thought it probable that the Effects would produce 15s. in the Pound; whereupon it was objected, that it was incumbent on the Plaintiff to prove that the Bankrupt's Estate would not produce 15s. in the Pound; whereas the Plaintiff's own Witness had proved the Probability of such a Payment; but his Lordship overruled this Objection, and a Verdict was given for the Plaintiff.

In an Action against a Bankrupt who has obtained his Certificate under a second Commission, the Certificate is no Bar, unless it appears affirmatively that his Estate has produced 15s. in the Pound; Evidence that it will probably produce so much is not sufficient.

*Puller* moved for a Nonsuit, or a new Trial, insisting, that unless the Objection taken at the Trial was allowed to prevail, a Bankrupt could never avail himself of a Certificate under a second Commission, provided the Creditor brought his Action immediately, and before a Dividend was declared: and he cited *Philpott v. Cordon* (a), and *Jeffs v. Ballard* (b). (Lord *Ellenborough*, C. J., inquired why the Defendant did not move to stay further Proceedings in the Action until a Dividend was declared). To which it was answered, that there was not any Instance of such a Motion.

LORD ELLENBOROUGH, C. J.—The Statute has not imposed upon the Court and Jury the Duty of judging by Anticipation to what Extent the Bankrupt's Estate will answer the Demands of his Creditors. If it has produced sufficient to pay 15s. in the Pound, that is clear and intelligible; but whether it will produce so much is another Question. The Words of the Statute are plain and explicit, and I dare not go against its Directions; and if it has been done in any Case, I do not feel myself at Liberty to follow the Example.

BAYLEY, J.—In *Jeffs v. Ballard*, the Court of Common Pleas seem to have considered the Payment of 15s. in the Pound as a Condition Precedent.

*Per Curiam*,

Rule refused.

(a) 5 T. R. 287.

(b) 1 Bos. and Pul. 467.

**YOUNG and OTHERS, against D. and A. HUNTER, R. RAINEY,  
and J. W. GLASS.**

Thursday, Nov. 12.

16th Vol. *East's Reports*, Part II. Pages 252, 253.

Where separate Commissions of Bankruptcy were issued against three of four Partners, to which they conformed and passed their Examination, and an Order was made for allowing the joint Creditors to prove their Debts under the Commission of one of the three, under which Commission the Plaintiffs proved their joint Debt, and afterwards sued all the Partners for the same Debt, and arrested one of the other two, under whose Commission they had not proved: Held that he was not entitled to be discharged out of Custody.

**T**HIS was a Rule obtained on a former Day for staying the Proceeding, and discharging the Defendant *Glass* out of Custody, in this Action. In July 1811, the Defendant *Glass* being in Partnership with the other Defendants, a separate Commission of Bankruptcy issued against him; and *F. Robertson*, one of the Plaintiffs, was chosen and acted as Assignee. Separate Commissions were also about the same Time issued against the two Defendants, *D. Hunter* and *R. Rainey*, but not against *A. Hunter*, under which they were also declared Bankrupts. Upon Application to the Lord Chancellor, for an Order to allow Proof of the joint Debts and Distribution of the joint Effects under one of the separate Commissions, his Lordship directed such Proof and Distribution to be made under the Commission against *Rainey*. In Pursuance of this Order the Plaintiffs proved their joint Debt under the Commission against *Rainey*, and afterwards brought this Action for the same Debt, and arrested the Defendant *Glass*. In Support of the Rule it was contended, that by proving their Debts under the Commission against *Rainey*, the Plaintiffs must be deemed to have made their Election to take the Benefit of such Commission within the Meeting of the Statute 49 Geo. III. c. 112. s. 14. But

*The Court*

Were of Opinion, that the Act of Parliament would not bear the Construction contended for; that it must be taken to relate to Cases where a Party, who had proved under a Commission, sues the same Person under whose Commission he has proved.

Rule discharged.

Thursday, Nov. 26,  
1812.

**WILLIAM PARKER and ANOTHER, Assignees of SAMUEL  
PARKER, a Bankrupt, against SMITH and OTHERS.**

16 *East*. 382, 387.

**I**N an Action by the Assignees of a Bankrupt, Underwriter, against the Defendants, Insurance Brokers, for the Balance of an adjusted Account between the Bankrupt and Defendants; and also for Premiums of Insurance on Policies underwritten by the Bankrupt with them as Brokers before the Bankruptcy; the Brokers are not entitled

titled to deduct, for Returns of Premium due on Policies, the Premiums of which Policies formed a Part of the adjusted Account, but where the Events entitling them to such Returns were not known till after such Adjustment; nor can they deduct for Returns of Premium on some of the Policies, for the Premiums of which the Action is brought, the Events entitling them to which Returns happened before the Bankruptcy, but the Returns were not adjusted; nor can they deduct for Returns on other Policies, for the Premiums of which the Action is brought, the Events entitling them to which Returns happened since the Bankruptcy, but before the Commencement of the Action; the Brokers not having a Commission *del credere*, nor being personally interested in any of the Insurances (a).

1812.  
WILLIAM  
PARKER and  
Another, Assignees  
of SAMUEL  
PARKER, a Bank-  
rupt, against  
SMITH and  
Others.

Lord ELLENBOROUGH, C.J. delivered the Judgment of the Court.

As there was in this Case no *del credere* Commission paid to the Brokers, the Dealings with them must be considered as Dealings with them merely in the Character of Agents for the Assured, and not as Dealings virtually had with the Assured themselves; on which special Ground *Grove v. Dubois*, 1 Term Rep. 112, was determined. In their Character of Agents, the Defendant's Authority as to Acts done, that is to say, Payments in Fact made, and Transactions actually executed and consummated, cannot be questioned. The Underwriter and his Assignees are precluded by Adjustments which took Place, from contending that the Brokers were not then well entitled to deduct and retain, what on the Behalf of the Assured, they in Fact then deducted and retained in Account with the Underwriter, for Losses, short Interest, and Returns of Premium; but more Deductions were made, and Acts done, under a determinable Authority as to all subsequent Concerns; and in as much as a Bankruptcy, on the Part of the Underwriter, has in Fact taken Place, the Consequence is, that the Authority of the Agent, the Brokers, was virtually countermanded and extinct by that Act of Bankruptcy, by which the Bankrupt's own original Power over the subject Matter ceased and became transferred to others. In Conformity therefore with what was decided by the Court of Common Pleas in *Minett* and another, Assignees of *Barchard v. Forrester*, which proceeded expressly on this Ground, that the Authority given by the Bankrupt ceased by his Bankruptcy, we are of Opinion that the Plaintiffs are entitled to recover all the three Sums demanded by this Action, the same not being retained by Virtue of any antecedent Adjustment by the Bankrupt, nor of any Authority from him, express or implied, extending to Payments or Adjustments to be made subsequent to his Bankruptcy.

(a) The above is merely the marginal intelligible, without a fuller Detail of the Abstract of the original Report. The Circumstances. Principle of the Judgment being perfectly

OLIVE.

OLIVE and OTHERS, Assignees of JOHN JACOB and WILLIAM JACOB, Bankrupts, v. SMITH and OTHERS.

June 29, 1813.

Taunton's Reports, Vol. V. P. 56, 68.

If a Person entrusted with Value trust his Creditor with that which may become productive of Value, the first becoming bankrupt, the second may retain his Debt out of the Proceeds of the Thing entrusted to him, and only pay the Balance.

*A*, a Merchant, employed *B*, a Broker, to effect Policies and sell Goods, and entrusted him with the Possession of the Policies, *A* being indebted to *B* for Premiums of Insurance, and having obtained an Advance of Money upon a Pledge of Goods placed in *B*'s Hands for Sale, but not on those Goods to the Exclusion of *A*'s general Credit, became bankrupt. Afterwards a Loss happened, and *B*, received it from the Underwriters. Held that this was a mutual Credit, within the Statute 30 Geo. II. c. 5, and that *B* might retain the Sum received for the Loss in Liquidation of his Advances as well as of the Balance due for Premiums.

**THE** Defendants were Insurance Brokers, and also general Brokers, and acted as such for the Bankrupts. The Bankrupts, before their Failure, placed some Coffee and Sugar in their Hands, with Instructions to sell, and obtain an Advance upon the Security of these Goods of £15,742: 6s.: 6d. by the Defendant's Acceptances, but nothing was at that Time said concerning the Policies. The Defendants had effected for the Bankrupts, before their Failure, a Policy, upon which a Loss occurred after the Bankruptcy, and the Defendants received thereon from the Underwriters £13,736: 16s.: 11d., which Sum, or at all Events, the Balance thereof, amounting, after deducting the Sum due on the Insurance Account (*a*), to £9659: 11s.: 8d., the Plaintiffs sought by this Action to recover. The Goods were not sold till after this Money had been recovered from the Underwriters, no Account relative to the Goods had been rendered before the Failure, nor any separate Insurance Account rendered since the Commencement of these Transactions.

*Best*, Serjeant, for the Plaintiffs, urged, that as the Money for the Loss was not received until after the Bankruptcy, there could be no set off.

*Shepherd*, Serjeant, for the Defendants, urged, first, that the Defendants, as Brokers, had a Lien on the Policy for their general Balance; or if not, then that this was a Case of mutual Credit within the Statute 5 Geo. III. c. 30. s. 32, and he cited the Cases of *Parker v. Carter* (*b*), *Whitehead v. Vaughan*, (*c*), *Ex parte Dezee* (*d*), *Atkinson, Assignee of Hodges v. Elliott* (*e*).

GIBBS, J.—Upon the Trial, thought that with Respect to the Policy

(*a*) The Bankrupts were indebted to the Defendants upon the Insurance Account in the Sum of 4057l. 11s. 8d.

(*b*) *Cook's* B. L. 567.

(*c*) *Ibid*.

(*d*) 1 *Atk.* 228.

(*e*) 7 T. R. 378.

Account,

Account, there was no Doubt but that the Sum due to the Defendants for Premiums was to be set against the Sum received by them for Losses; and they might retain this by Virtue of the Lien; but he did not think the Brokers had a Lien on the Policy for their Advances on the Goods. The Question was, whether the whole Accounts were to be mingled? and whether the Defendants, who had received a Sum of Money on that Policy, could apply it as against the Money that had been advanced on the Goods? and whether it was, as was urged, within the Statute 5 Geo. II. a mutual Credit. As to this, *Gibbs, J.* left it to the Jury, whether the Effect of the Agreement to advance Two-thirds of the Value of the Goods was to restrict the Lenders to the Security of those Goods only, and not to give them the general Security of the Defendants; if it was not restricted to the Goods, he thought it a Case of mutual Credit. The Jury found that the Security was not restricted to the Goods, and that there was nothing to exclude the Securities of the Policies, and found a Verdict for the Defendants. The learned Judge did not decide this on the Authority of *Parker v. Carter* in particular, but on the Fact, that the Bankrupts had trusted the Defendants with the Possession of Goods, and of Policies of Insurance, and that the Defendants had trusted the Bankrupts with the Money advanced and the Premiums paid for them on the Policies partly on the Securities of the Policies, and that the general Principle was, that wherever each Party has trusted the other with the Possession of Value, the Assignees of either, becoming a Bankrupt, cannot withdraw that Value from the other, but on the Terms of paying the Defendant what is due between them.

1813.  
OLIVE and Others,  
Assignees of JOHN  
JACOB and  
WILLIAM JACOB,  
Bankrupts, v. SMITH  
and Others.

*Best*, Serjeant, in *Easter Term*, obtained a Rule *Nisi* to set aside the Verdict, and have a new Trial.

*Shepherd* and *Vaughan*, Serjeants, shewed Cause against the Rule.

*MANFIELD, C. J.*—The Case of *Parker v. Carter* runs upon all fours with the present Case; the Cases of *French v. Ferne*, and *Ex parte Prescott*, are also prodigiously strong; some of those Cases seem to have gone further than the Words of the Statute would clearly warrant, and say, that wherever there is a mutual Trust, the Balance only shall be paid. I should have thought that the Words of the Statute meant only Money Transactions; but if the Extension of mutual Credit be, as it has been contended, a mistaken Doctrine, the Mistake is so deeply rooted, it having been again and again confirmed, that it would be rash indeed to overturn it, and there is a great Deal of Justice in the Determination, at which not only the Court of King's Bench, but the Court of Chancery have arrived on this Point. It would be nugatory to put this in a Course of further Discussion, when  
every



1812.

OLIVE and  
Others, Assignees  
of JOHN JACOB  
and WILLIAM  
JACOB, Bank-  
rupts, v. SMITH  
and Others.

every Court would say, that the Point had been determined again and again; the Rule therefore must be discharged.

HEATH and CHAMBRE, Js. concurred.

GIBBS, J.—It is too much to ask us to send the Case to two other Courts (a), when the Counsel for the Plaintiffs clearly shew they are convinced in this; and the more the Doctrine is thought of, and the more they discuss and analyse every Case that has been so decided, the more they feel it.

Rule discharged.

(a) It had been prayed in Argument that the Case might be turned into a special Verdict.

MEYER and OTHERS, Assignees of GRANT, a Bankrupt,  
v. SHARPE and OTHERS.

June 30, 1813.

Taunton's Reports, 5 Vol. P. 74. 80.

A Merchant pledges for Value the Bills of Lading of an expected Cargo, his Property, in the Profits of which his Agents abroad were interested in a certain Proportion. His Agents, without the Knowledge of the Owner or the Pawnee, disposed of Part of the Cargo abroad, after which the Owner becomes a Bankrupt; he induces the Agents to replace the Goods disposed of by others, of which the Agents give him Bills of Lading, and he sends them to the Pawnees to make good their Security: Held that the Assignees of the Bankrupt might recover the substituted Goods against the Pawnees.

A Bill of Lading is not a necessary Instrument of the Transfer of Property in Goods consigned to the Owner.

An Agent, who is paid by a Proportion of the Profits of the Adventure, is not therefore a Partner in the Goods.

GRANT was a Merchant in London, trading to and from Russia. The Defendants were Brokers in London, and were in the Habit of accommodating him with their Acceptances, upon having Goods, or the Bills of Lading for them, put into their Hands. In 1809 the Bankrupt sent out the *Latona* to St. Petersburg with a Cargo, which he had purchased and paid for, consigned to Krehmer, Lang, and Co. of that Place, who were to return the Proceeds to him in Russia Produce. Krehmer, Lang, and Co. were interested in one Third of the Profit and Loss of the outward Adventure, and in one Half of the Profit and Loss of the homeward-bound Adventure. They, in October 1809, purchased Goods with such Proceeds, and shipped them on Board the *Latona*, under Bills of Lading of that Date, specifying the Goods deliverable to the Orders of the Shippers, and sent these Bills of Lading, unindorsed, to the Bankrupt, who received them in February 1810, and enclosed them in a Letter to the Defendants, stating, that he sent them the Bills of Lading of the specified Goods by the *Latona*. On

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the twenty-third of the same Month, *Grant* drew sixteen Bills of Exchange on the Defendants, amounting in the Whole to £33,000, of which he advised them; and, as a further Security for the Advance, he therewith bound himself to make over to them, a full and complete Title to the Goods in any Manner they might consider most eligible. These Bills the Defendants accepted and duly paid. The Bankrupt stopped Payment on the 8th March 1810, and committed an Act of Bankruptcy on the Twenty-fourth of the same Month; but a Letter of License was afterwards granted him by his Creditors, which was signed by the Defendants, who were fully apprised of the State of his Affairs. A Commission of Bankrupt was taken out against him on the 18th of December following, under which the Plaintiffs were chosen Assignees of his Estate. The *Latona*, although her Cargo was put on Board in October, was obliged to pass the Winter at *St. Petersburg*, during which, *Krehmer, Lang, and Co.* without the Knowledge either of *Grant*, or of the Defendants, took from on Board her, and disposed of in *Russia*, certain Pieces of Sail-cloth, and Bales of Ravensducks and Flemish Cloths, comprized in the before-mentioned Bills of Lading; and afterwards, in Consequence of an Interview between the Bankrupt, who went to the North of Europe to collect the Effects, and *Lang*, and of a Remonstrance made by *Grant*, in Lieu of the Goods so taken out, *Krehmer, Lang, and Co.* put on Board the Ship *Latona* certain other Goods, for which the Bankrupt obtained from them Bills of Lading, dated the 8th and 10th of August 1810, whereby the Master of the *Latona* "acknowledged to have received from *Krehmer, Lang, and Co.* the Articles therein specified, to be delivered to the Holder of the Bill of Lading, signed by him in October 1809, for 791 Pieces of Sail-cloth, 44 Bales of Flemish Linen, and 60 Pieces of Ravensducks." The Bankrupt sent these Bills of Lading, not indorsed, inclosed in a Letter, which he addressed from *Gottenburgh*, to the Defendants, stating that the *Latona* was on her Voyage, and he trusted that certain Sums therein mentioned, together with the Value of the *Latona*, would cover them for the Advance they had so liberally made. The *Latona* arrived in *London* in November following, when the Whole of her Cargo, consisting of such Parts of the Goods mentioned in the original Bills of Lading as were not taken from on Board the Ship at *St. Petersburg*, and the Goods mentioned in the Bills of Lading of the 8th and 10th of August 1810 were taken Possession of by the Defendants, who afterwards sold the same. The nett Proceeds, amounting to £13,327: 8s.: 7d., were applied by the Defendants in Reduction of the Balance due to them from the Bankrupt; after giving Credit for this Sum, the Defendants were Creditors of the Bankrupt to a considerable Amount. *Krehmer, Lang, and Co.* were indebted to *Grant*. *Grant*, in his Examination at the Trial, stated, that the Goods in dispute were his Property;

1812.

MEYER and  
Others, Assignees  
of GRANT, a  
Bankrupt, v.  
SHARPE and  
Others.

1812.

MEYER and  
Others, Assignees  
of GRANT, a  
Bankrupt, v.  
SHARPE and  
Others.

Property; but he further stated in Explanation, that *Krehmer, Lang* and Co. were interested in the Adventures outwards and homewards, in the Proportions before mentioned. The Question for the Opinion of the Court was, whether the Plaintiffs were entitled to the Value of the Whole, or of any Part of the Cargo of the *Latona*? If the Court should be of Opinion that the Plaintiffs were entitled to the whole Cargo, then the Verdict was to stand (a). If to any Part of the same, the Verdict was to be reduced accordingly; and if the Plaintiffs were not entitled to recover, a Nonsuit was to be entered.

*Lens*, Serjeant, for the Plaintiffs argued, that they were entitled to recover, at least the substituted Part of the Cargo, which was entirely a new Purchase on the sole Account of *Grant*, made when he was incapable of acquiring Property: *Krehmer* and *Lang* were Partners in the Cargo, but only in the Profits.

*Vaughan*, Serjeant, for the Defendants, contended that as *Grant* had transferred his equitable Right to the original Goods before the Bankruptcy, the substituted Goods must ensue the same Title (b), and *Grant* was bound, notwithstanding his Bankruptcy, to complete the Transfer. That it was within the Case of *Olive v. Smith*, ante 122.

MANFIELD, C. J.—As to the Goods originally shipped by the *Latona*, though the Bills of Lading were not so indorsed as to give the *Sharpes* a legal Title to the Goods, that Imperfection will not prevent the *Sharpes* from retaining those Goods in Part Indemnity against their Acceptances. The substituted Goods stand on entirely different Grounds; *Grant* has sworn that these Goods were wholly his Property. *Krehmer* and *Lang* were interested in the Adventure, but there is a clear Distinction between being Partners in the Goods, and being interested in the Adventure. If they were the Goods of *Grant*, *Krehmer* and *Lang* could not assign them without the Order of *Grant*; and *Grant* was now become incapable to give the Order, for he ceased to have Property in them; all belonged to his Assignees, or rather the Property never was in *Grant*, for they never were purchased till after the Bankruptcy; the Plaintiffs must therefore recover the substituted Goods.

HEATH and CHAMBER, Js. concurred.

GIBBS, J.—I am of the same Opinion. If in any of *Grant's* Letters

(a) The Action was Trover. Verdict for the Plaintiff, subject to the above Case. (b) *Fox v. Hanbury, Cooper*, 445.

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there had been any Word of his pledging the Cargo, be it what it might, I should have thought that the equitable Assignment would have taken Place; if *Grant* not only did not know that any of the Goods would be taken out, and others put in their Place, but did not provide for any such Case, it would be too much to say, that when the Case occurred, those other Goods could pass by the original Transfer.

1812.  
MEYER and  
Others, Assignees  
of GRANT, a  
Bankrupt, v.  
SHARPE and  
Others.

READ v. COOPER.

July 5, 1812.

*Taunton's Reports*, Vol. V. 89.

**B**EST, Serjeant, shewed for Cause against a Rule to set aside a Judgment, as in Case of a Nonsuit, for not proceeding to Trial, that the Affidavits upon which it had been obtained were sworn before the Defendant's own Attorney, but who was not the Attorney on the Record.

GIBBS, J.—If he is not the Attorney on the Record, it will not vitiate.

But then went to the Merits, and the Court discharged the Rule, imposing the Terms of admitting the Assignments in Bankruptcy.

GIBBS, J.—We are so strongly impressed in the King's Bench with the Propriety of admitting those, that the Counsel came to an Agreement never to hesitate to admit an Assignment, unless a particular Reason could be stated for it.

If the Agent in Town is the Attorney on the Record, it is no Objection to an Affidavit of the Party, that it is sworn before his own Attorney in the Country.

Assignments in Bankruptcy ought to be admitted.

WHEELWRIGHT and OTHERS, Assignees of BULL and OTHERS,  
v. JACKSON.

July 5.

*Taunton's Reports*, Vol. V. P. 109. 117.

**T**HIS was an Action of Trover, brought by the Plaintiffs, the Assignees of *Bull* and Co. against the Defendant, to recover  
A Creditor obtains a Preference in Contemplation of an intended Deed of Composition, which would be fraudulent against the Creditors under that Deed; the Composition going off, the Creditor may hold his Securities against a Commission of Bankrupt subsequently issued, and not contemplated at the Time of the Preference.

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1812.  
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 WHEELWRIGHT  
 and Others, As-  
 signees of BULL  
 and Others, v.  
 JACKSON.

the Value of certain Notes and Bills of Exchange, which the Defendants had received from the Bankrupts before their Bankruptcy. The Bankrupts being embarrassed, stated the Circumstance to the Defendant, one of their principal Creditors. The Defendant caused a Deed of Trust to be prepared, bearing Date the 2d of *September*, into which, at the Defendant's Suggestion, was introduced a Clause, confirming to all the Creditors the Benefit of all Securities which they should hold at the Time of their respective Execution thereof; and he refused to execute this Deed until he had, on the 8th of *September*, received the Bills in Question: all these Bills were included in the Account of Stock, which was taken in Order to be laid before the Creditors, as the Statement of the Funds to which they were to look for Payment of their respective Dividends, which were to be made by Instalments, at four, eight, twelve, sixteen, twenty, and twenty-four Month's Date from the first of *August*. The Whole of the Bills were clearly given as the Consideration for executing the Agreement. The Bankrupts had not at that Time the least Doubt but that their Estate was solvent; the Bills were not given in Contemplation of Bankruptcy, for no Bankruptcy was then thought of; either by the Bankrupts or any other Person; but not more than five Creditors having signed the Deed of Composition, the Matter went off, but the Defendant retained the Bills which he had received, and about four Months afterwards a Commission of Bankrupt issued against *Bull and Co.*

MANSFIELD, C. J. delivered the Opinion of the Court.

If that Composition had stood, I think there cannot be a Doubt that *Jackson* would have been deemed to have acted fraudulently, and that he could not have held the Advantage he had gained. The Bankruptcy did not happen till four Months after; but that Event was wholly unforeseen: it might not have happened for a Twelvemonth, or not at all. We cannot therefore see how this was a Fraud on the Commission. It is therefore with great Reluctance we establish the Defendant's Right to retain these Bills; but finding no Case to establish a contrary Decision, we are afraid to make a new Precedent without seeing a clear Principle on which we could support it. We therefore must make the Rule absolute for a new Trial.

FRY v. MALCOLM.

July 2, 1812.

Tsuntou's Rep. Vol. V. P. 117. 120.

**T**HIS was an Action upon a Bill of Exchange. It was proved that *Allan Newman* having become insolvent, his Brother *William Newman*, by Way of inducing the Plaintiffs to sue out a Commission of Bankrupt against *Allan Newman*, engaged to them, that if they would become the Petitioning Creditors, their Dividends out of the Effects should amount to 5s. in the Pound upon the Sum of their Debt, otherwise he would himself make good the Deficiency; and he was to have the Surplus, if any accrued. The Plaintiffs accordingly sued out the Commission. *William Newman* gave them this Bill upon the Defendant, who accepted it at *William Newman's* Request for the Plaintiffs.

A Creditor may legally contract to sue out a Commission of Bankruptcy against his Debtor, in Consideration that a Friend of the Debtor, will give the Petitioning Creditor 5s. in the Pound for his Debt; and if Bill given for the agreed Sum is a valid Bill.

*Best*, Serjeant, in *Easter Term*, moved for a new Trial, on the Ground that the Transaction was void within the general Policy of the Bankrupt Law.

*Shepherd*, Serjeant, shewed Cause, contending that the Transaction was nothing more than a mere Sale of the Debt and Dividends.

*MANFIELD*, C. J.—I was struck with the Argument that this was a friendly Commission, and a concerted Bankruptcy; and if there was any Evidence of this, I should be disposed to grant this Rule: but there is no Evidence of the Fact; and that being so, I see no Reason why the Plaintiff should not be at Liberty to sell his Debt, and receive this Bill for it, he suing out a Commission.

*HEATH*, J. and *GIBBS*, J. concurred.

Nov. 6, 1813.

## JEREMIAH HOWELL, v. GOLLEDGE.

5 Taunton's Rep. 174. 176.

A Person, to, whom several Debts were due from a Bankrupt, arising out of separate Sales of Goods, proved some of the Debts under the Commission; another Person, who was suggested to be a Trustee for him, sued at Law, upon a Note, which the Bankrupt had given for another Part of the Goods sold. The Court refused to interfere in a summary Way to stay Proceedings on the Bail Bond in this Action.

**H**EWYWOOD, Serjeant, moved that the Bail Bond in this Cause might be delivered up, and that all Proceedings thereon, and in the original Cause, might be stayed, upon an Affidavit, which stated, that the Defendant purchased of *John Howell*, in October 1812, two Quantities of Deals, one for £72: 10s., for which he gave his Note of the 14th of January 1813, at four Months Date; another Quantity for £123: 5s., for which he gave no Note. On the 30th of March a Commission issued against him, at which Time he was indebted to *John Howell* in £195: 15s. *John Howell* proved under the Commission only the Debt of £123: 5s. for Goods sold and delivered. When the Note became due, the Bankers of *John Howell* presented it to the Defendant for Payment, there being no Indorsement except that of the Payee: it was not paid, and this Action was now commenced upon that Note; and the Plaintiff held the Defendant to Bail. The Defendant swore he believed this Action was brought for the Benefit of the Payee, *John Howell*. *Heywood* contended that the Payee could not vary his Right, nor transfer the Debt to another after the Bankruptcy; and that by proving under the Commission a Part of his Debt, he had made his Election not to sue for any Part of it under the Statute of 49 Geo. III. c. 121 (a).

GIBBS, J.—If the Indorsement, being made subsequent to the Bankruptcy, makes any Difference in the relative Rights of the Parties, the Defendant may avail himself of that Point at the Trial; if not, he is not injured.

The Court rejected the Application.

(a) *Ex parte Dickson*, 1 Vol. 92.

## BRIND v. BACON.

Nov. 11, 1813.

5 Taunton's Rep. Page 133.

The Guarantee of a Bill discharged by Bankruptcy of his Liability on the Bill, is not an incompetent Witness in an Action on the Bill, by Reason of his Liability to Costs in an Action on the Bill.

**B**EST, Serjeant, moved to set aside a Verdict on Account of the Admission of a Witness, whom he contended to be incompetent.

21

the Witness was Guarantee of a Bill of Exchange, and had been a Bankrupt, and *Best* had objected, that although he was discharged as to the Bill by the Statute 49 Geo. III. c. 121. s. 8, yet that he was not thereby discharged from the Costs of any Action that might be brought on the Bill, because those Costs, being only a consequential Damage of the Bankrupt's Engagement, would not ensue the original Debt, and could not be proved under the Commission, and therefore created a remaining Interest, which rendered the Witness incompetent.

1812.  
BRINDON.  
BACON.

MANSFIELD, C. J. and HEATH, J. the only Judges present, agreed that the Costs must follow the Debt, and that it was impossible to separate them, and

Refused the Rule.

GLADSTONE and OTHERS, Assignees of JAMES SILL and  
WILLIAM WATSON, Bankrupts, against HADWEN.

Friday, May 28,  
1812.

1 Maule and Selwyn, Reports, P. 517. 527.

ON the 25th of October 1810, James Sill applied to the Defendant for the Loan of £8000, telling him that he would give him ample Security. The Defendant thereupon delivered to Sill Bills of Exchange to the Amount of £1860: 14s.: 6d., and also a Draft drawn by the Defendant on his own Bankers for the Sum of £2139: 6s. 6d., but which was never accepted; and received from Sill, as the Security proposed, a certain Paper Writing, addressed to him (the Defendant) to the Tenor following:—"We have a Right to hold 250 Tierces of Coffee now landing from the *Funny*, from *Jamaica*, or the Proceeds thereof, for securing to us a Sum of £6000; we delegate that Right to thee, for the Purpose of securing out of the Debt due to us any Balance we may owe thee, not exceeding the Sum of £6000. Signed J. Sill and Co. Liverpool, 25th of 10 Mo. 1810." The Coffee was the Property of another Person, over which Sill had no Control, nor any Lien whatsoever. Sill having received the Bills of Exchange and Draft, sent them on the same 25th of October by the

Where S. obtained Bills of Exchange from the Defendant upon a fraudulent Representation, that a Security given by him to the Defendant (which was void) was an ample Security, and on the next Day, having resolved to stop Payment, informed the Defendant that he had repented of what he had done, and had sent express to stop the Bills, and would return them; and three Days afterwards committed an Act of

Bankruptcy; after which he returned to the Defendant all the Bills (except one which had been discounted), and also two Bank Notes, Part of the Proceeds of such Discount, and the Defendant delivered back the Security, and afterwards a Commission of Bankruptcy issued against S. the Assignee under which Commission brought Trover against the Defendant for the Bills and Bank Notes. Held that the Defendant was entitled to retain them.



1813.  
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 GLADSTONE and  
 Others, Assignees  
 of JAMES SILL  
 and WILLIAM  
 WATSON, Bank-  
 rupts, against  
 HADWEN.

Post to his Partner, *William Watson*, who was then in *London*, directing him to retain them until twelve o'Clock on *Saturday*, and then, if he did not hear from *Sill* to the contrary, to deliver them to *Richardson, Overend, and Co. of London*.

On the 26th of *October*, *Sill* having resolved to stop Payment, sent off a Messenger express to *London*, for the Purpose of stopping the Bills and Draft, and preventing the same from being paid to *Richardson, Overend, and Co.* The Messenger arrived in *London* on the 27th of *October*, and stopped the Bills and Draft in the Hands of *Watson*, who had not at that Time received the Bills, but received them about an Hour afterwards, and then returned to *Liverpool*, and arrived there on the 28th of *October*, bringing with him the Draft and the Bills, except one for £49: 18s., which he had discounted, and out of the Proceeds of which he brought two Bank of *England* Notes for £5 each, which he delivered to *Sill*. On the 26th of *October*, after *Sill* had sent off the Messenger to *London*, the Defendant applied to *Sill* for the Particulars of the Casks of Coffee mentioned in the Security, when *Sill* informed him that he had resolved to go no farther, and had sent off a Person to *London* to stop the Bills and Draft, and that he would return them to the Defendant. On the 29th of *October*, *Sill* and *Watson* committed Acts of Bankruptcy. On the same Day, after the Act of Bankruptcy had been committed, *Sill* sent to the Defendant the Draft and Bills (except that for £49: 18s.), and two Bank of *England* Notes for £5 each, Part of the Proceeds of the said Bill for £49: 18s., and the Defendant delivered up the Paper Writing. On the 6th of *November* following a Commission of Bankruptcy issued against *Sill* and *Watson*, who were duly declared Bankrupts, and an Assignment of their Estate and Effects was made to the Plaintiffs, and the Defendant converted to his own Use the Bills, Drafts, and Bank Notes, so received by him. The Question for the Opinion of the Court is, whether the Plaintiffs are entitled to recover (a): if they are so entitled, the Verdict is to stand for £1810: 16s. 6d. and £10, both or either of those Sums, as the Court shall direct; if not, a Nonsuit to be entered.

*Richardson* for the Plaintiffs, contended that this presented the common Case of a Loan upon Security, which afterwards turns out to be bad; and that *Sill*, having made no Communication to the Defendant of his Intention to rescind the Loan till after he had determined to stop Payment, was not then in a Condition to exercise an Election. The Promise to return the Bills was made in Contemplation and upon the Eve of Bankruptcy, and was a fraudulent Preference, and

(a) The Action was TROVER by the Assignees, and a Verdict for them subject to the above Case.

the Bills were not returned until after the Bankruptcy, and after one of them had been discounted, which shews that the Bankrupts had the Control over the Whole: at all Events, the Defendant was not entitled to the two Bank Notes, for by discounting the Bill the Bankrupts made the Proceeds their own, and they had the Bank Notes in their Possession, Order, and Disposition, within 21 *James I. c. 19*. Suppose the Question had arisen upon an Indictment against *Sill* for a Felony, and it had appeared that he obtained these Bills by this Fraud, he would have been entitled to an Acquittal, on the Principle that where the Owner intends at the Time to part with the Property, it cannot be a Felony.

1812.  
GLADSTONE and  
Others, Assignees of  
JAMES SILL and  
WILLIAM WAT-  
SON, Bankrupts,  
against HADWEN.

*Littledale* for the Defendant, insisted that the Delivery of the Bills to *Sill* worked only a Change of Possession, and not of Property. It was obtained by Fraud; as between the Parties themselves every Contract founded in Fraud is void. Even a Sale in Market-overt, if made by covin, will not bar him that hath the Right (a). The Cases alluded to from the criminal Law proceed on a Rule peculiar to Cases of Felony, which requires that there should be a Trespass in the taking. As between the Bankrupts and the Defendant a Court of Equity would have ordered the Bills to be returned, considering the Bankrupts as Trustees for the Defendant. The Assignees take subject to all Equities which would have attached upon the Bankrupts, they are therefore Trustees for the Defendant. But, admitting the Contract to have been binding, the Parties have rescinded it; and although it is said, that this was in Contemplation of Bankruptcy, and not executed until after the Bankruptcy, that Rule applies only to Cases where the Creditors are defrauded by the Agreement; but if it be such as ought in Conscience to be performed, the Assignees will be bound to carry it into Effect (b).

*Lord ELLENBOROUGH*, C. J. delivered the Judgment of the Court.— In this Case Bills were obtained by the Bankrupt (*Sill*) under a false Pretence of giving the Defendant an ample Security; whereas the Security pretended to be given was the Property of another Person, over which *Sill* had no Control or Lien. The Bills therefore have been obtained by a criminal Fraud. It has been argued on Behalf of the Assignees, that the Property vested in them under the Commission; and that by Analogy to Cases in the criminal Law, the Property may be considered as having passed from the Defendant to *Sill* and Co.;

(a) 2 Inst. 712. *Sir Wm. Jones*, 164. C. 111. *Rees v. Marquis of Londfort*, 2  
(b) 6 Mod. 114. *Parker v. Patrick*, 5 T. Camp. N. P. C. 574. *Barnes v. Frestland*,  
R. 176. 2 Inst. 712. *Sir W. Jones*, 164. 6 T. R. 80.  
*Barison v. Walter*, Peate's Cases, N. P.

but

1812.

GLADSTONE and  
Others, Assignees of  
JAMES SILL and  
WILLIAM WAT-  
SON, Bankrupts,  
against HADWEN.

but if it did, it was under such Circumstances as a Court of Equity would have directed the Property to be restored. It would be useless for a Court of Law to permit that to be recovered which could not be retained. In *Scott v. Surman* (a), WILLES, C. J. says, "Assignees under a Commission of Bankrupt are not to be considered as general Assignees of all the real and personal Estate of which the Bankrupt was seised and possessed, as Heirs and Executors are of the Estate of their Ancestors and Testators; but that nothing vests in these Assignees, even at Law, but such real and personal Estate of the Bankrupt in which he had the equitable as well as the legal Interest, and which is to be applied to the Payment of the Bankrupt's Debts. It would be absurd to say any Thing shall vest in the Assignees for no other Purpose, but in Order that there may be a Bill of Equity brought against them, by which they will be obliged to refund and account; and according to the Case of *Burdett v. Willett*, will likewise have Costs decreed against them." On these Principles, and on the Authority of the Cases cited, we are of Opinion that the Assignees are not entitled to recover the Property. A Distinction has been raised as to the Bank Notes; but we think that as the Bank Notes were not mixed with the Rest of the Bankrupt's Property, and are capable of being distinctly traced, they stand in the same Position as the Bills themselves, and therefore cannot be recovered.

Judgment for Defendant.

(a) *Willes*, 404.

Saturday, June 19. ALLANSON and ANOTHER, Assignees of ROBERTS, a Bankrupt,  
against ATKINSON.

1 *Maule and Selwyn*, Rep. 583. 587.

Where R., a Tradesman, being arrested at the Suit of the Defendant, upon a *ca. sa.*, placed Goods in the Hands of the Sheriff's Officer, to raise

**A**SSUMPSIT for Money had and received. *Roberts* had been arrested upon a *ca. sa.* at the Suit of the Defendant, by a Sheriff's Officer, who left him in Custody of his Brother. While in Custody, *Roberts* proposed that the Brother should take a Quantity of Goods out of his Shop and pledge them to the Amount of the Levy. A Money upon them, who accordingly pledged them, and five Weeks afterwards paid over the Amount to the Defendant: Held, that the Assignees of R., who had committed an Act of Bankruptcy before the Arrest, might recover the Money paid to the Defendant in an Action for Money had and received, although the Defendant was not privy to the taking of the Goods by the Sheriff's Officer, and although the Money paid to the Defendant was not the identical Money raised by the Pledge.

Quantity

Quantity of Goods was accordingly taken out and pawned. The Money thus raised was paid over by the Brother to the Sheriff's Officer, who, five Weeks afterwards, paid it over to the Defendants; not however in the identical Money raised by the Pledge. The Officer had Notice that *Roberts* had committed an Act of Bankruptcy before the Property was taken. It was objected for the Defendant, that as he was not privy to the Act of the Sheriff's Officer in taking the Goods, and only received the Money in Payment of his Debt as the Money of the Sheriff, and not of the Bankrupt, this Action was not maintainable; but the Remedy was by Action of Trover against the Sheriff. His Lordship directed the Jury to find a Verdict for the Plaintiffs, giving Liberty to the Defendant to move to enter a Nonsuit.

ALLANSON and  
Another, Assignees of  
ROBERTS, a Bank-  
rupt, against ATKIN-  
SON.

A Rule *Nisi* for that Purpose having been obtained in Easter Term, and Cause shewn against it,

Lord ELLENBOROUGH, C. J.—It is admitted that if the Goods subsisted in Specie, Trover would lie; and what Objection is there where they have been converted into Money to the Action for Money had and received? My only Doubt was, whether, as the Defendant did not appear to be privy to the taking, and as the Money paid to him was not the Money immediately produced by the Disposal of the Goods, this was strictly speaking the Money of the Assignees; but in as much as the Goods of the Bankrupt were converted into Money, the Moment the Produce of the Goods, in Money, came into the Pocket of the Defendant, I think it became Money received to the Use of the Assignees.

LE BLANC, J.—If the Defendant had chosen to object to receiving the Money, he might have done so, and had his Remedy against the Sheriff; instead of which he is content to receive it as the Money of the Bankrupt.

BAILEY, J.—I concur in the same Opinion.

Rule discharged.

*Kitchin v. Camp's L, 3 H. & L. 307.*

On the Part of JOHN BELL and OTHERS, who have survived  
WILLIAM BELL, deceased, and of R. G. BEASLEY, Admin-  
istrator of the said WILLIAM BELL, in the Matter of SCOTT.

July 7, 1818.

1 Maule and Selwyn, Rep. 751. 757.

Money advanced to  
S. by B. one of several Partners, out of the Partnership Funds, on Account of Payments to be made on Policies of Insurance underwritten by S. on Account of himself and B. in Pursuance of a previous Agreement between them to become Sharers in Profit and Loss on such Policies, was held not proveable by the surviving Partners of B.

**THE** Lord CHANCELLOR directed the following Case for the Opinion of this Court :—

*J. Bell* and others carried on Business in Partnership, under the Firm of *William and John Bell and Co.* On the 1st of January 1803, *William Bell*, and *Scott* the Bankrupt, agreed to become interested in Partnership on Policies of Insurance on Marine Risks. *William Bell* advanced Money to *Scott* from Time to Time out of the Funds of the House of *Bell and Co.*; leaving, on the 31st of August 1810 (on which Day *William Bell* died) a Balance of £9495:16s.:5d. due from *Scott* to the House of *Bell and Co.* The Monies so advanced were on Accounts of Payments to be made, on Policies of Insurance underwritten by *Scott*, on the Partnership Account between him and *William Bell*.

The Question for the Opinion of the Court was, whether *J. Bell* and others, as the surviving Partners of *William Bell*, were, or the said *R. G. Beasley*, as his Administrator, was, entitled to prove the Whole, or any Part of the above Balance.

Lord ELLENBOROUGH, C. J.—If there were any Possibility of separating the guilty from the innocent Partner, the Court would gladly have caught hold of any Circumstance for that Purpose. This is clearly an Attempt to recover back Money advanced for the Furtherance, and in the very Execution of an illegal Contract; and if recoverable, so might Money advanced for the Purposes of carrying on a smuggling Transaction.

The Court certified against the Admission of the Proof.

CHENOWETH against HALEY.

Thursday, July 1.

1 *Moule and Selwyn*, Rep. 676. 679.

**A**CTION against the Sheriff for a false Return. The Question turned upon the Act of Bankruptcy; a Witness, who was a Neighbour of *Haley*, proved that on the 23d of April *Haley* came to his Shop, and said that he expected every Moment to be arrested, but did not mention any Means of avoiding it. When he was about to leave Witness's Shop, a Sheriff's Officer having just gone down the Street, the Witness told *Haley* that he was going towards his House; on which he became agitated, and desired the Witness to watch him: and that he might not be seen by the Officer, went into the Witness's back Shop, and told him he went thither for that Purpose, and was afraid that the Officer had a Writ against him. He wished the Witness to see if the Officer went to his Premises. The Officer did not go thither, but, after going to another House, left the Street; and when he was gone, the Witness told *Haley*, who still continued in the back Shop; upon which he said, "Thank God, I will now go in;" and the Witness then saw him go home. The learned Judge(s) was of Opinion that *Haley* had absented himself to the Intent to delay his Creditors within the Meaning of 13 *Eliz. c. 7. s. 1*, and 1 *Jac. 1. c. 15, s. 2*. Whereupon a Verdict was found for the Defendant.

Where a Trader went to his Neighbour and told him he expected to be arrested, and while he remained there was informed that a Sheriff's Officer was going towards his House, upon which he concealed himself in the back Room, and desired his Neighbour to watch, and when told that the Officer had gone past his House and had left the Street, immediately returned home: Held that this was an Act of Bankruptcy within the Words of 13 *E. 1. c. 7*, and 1 *J. c. 15*, "otherwise absenting himself to the Intent to delay Creditors," although it appeared not only that no Creditor was delayed, but that none could possibly be delayed.

In Easter Term a Rule Nisi was obtained for a new Trial, on the Ground that a Delay in returning to his House, caused by the mere Apprehension of Arrest, had never been decided to amount to an Act of Bankruptcy; and the Case was likened to *Garret v. Moule* (b). And now the Rule coming on,

*Lord ELLENBOROUGH, C. J.*—The Instances enumerated in the two Acts are the several Criteria of Insolvency, by which, when coupled with an Intent to hinder his Creditors, the Party is to be adjudged bankrupt. *Robertson v. Liddell* decided that the Intent and not the actual Delay was what the Statute meant; and the Moment the Court have determined that, it becomes immaterial whether there was a Possibility or not of Delay.

Rule discharged.

*Vide Ex parte Osborne*, 1 Vol. 201. N.

(a) *Chambre, J.*

(b) 5 F. R. 676.

KENSINGTON.

April 10, 1813.

KENSINGTON, *Ex parte*.Vol. II. of *Vesey and Beames' Reports*, Pages 79. 85.

Equitable Mortgage by Deposit of Deeds extended beyond the original Purpose, to Advances after an Alteration of the Firm by Implication or Parol.

Stock in the Public Funds, in the Names of a Bankrupt and others, on Trust: The Bankrupt being one of the *Cestuis que Trust*, his equitable Interest not within the Statute 21 J. I. c. 19. s. 11, and therefore not being capable of actual Transfer, passed by Assignment.

**D**UNCAN Hunter, on the 19th of March 1805, deposited with the Petitioners several Deeds, and signed the following Memorandum, addressed to Messrs. *Moffatt, Kensington, and Syan, Bankers, London*. "Gentlemen, herewith I deposit in your Hands the Deeds and Policy of Assurance upon the following Leasehold Property," describing it "as a collateral Security for the Balance of any Sum of Money which you may at any Time advance for my Account."

On the 25th of September 1805, Hunter executed a Bond to the same Persons in the Penalty of £40,000, with Condition for Payment to them; and in Case of any Alteration taking Place in their Firm, then to the Persons composing a new Firm, if comprising two of the original Members, of all Sums thereafter in any Manner lent unto or advanced on his Account by the Petitioners. In December following *Moffatt* retired from the Partnership. In March 1809, Hunter, wanting farther Advances, proposed a Deposit of other Deeds of Premises, held under the Drapers' Company at a Rent of £400 a Year, and agreed to assign to the Petitioners his Interest in £3000 Three per Cent. Consolidated Bank Annuities, invested in the Names of the Drapers' Company and his own, for securing the due Payment of the said Rent of £400; and he signed the following Memorandum: "*London, 30th March, 1809. Messrs. Kensington, Syan, and Adams, I have lodged in your Hands the Lease and other Deeds belonging to the Old Stock Exchange, which are to lie as a collateral Security for any Advances which you may make for my Account, and which I hereby engage and promise to assign over to you in the regular Way when required, as also £3000 Three per Cent. Consols, which are deposited in my Name with that of the Drapers' Company, as a Security for the Ground Rent, and which I hereby acknowledge are also to be transferred or assigned over to you when required.*"

In July 1811, Hunter was declared a Bankrupt: when a considerable Balance being due to the Petitioners, and their Application, as Mortgagees, for a Sale under the general Order, being rejected by the Commissioners, the Petition was presented, praying a Sale of the mortgaged Premises, and the Bankrupt's Interest in the £3000 Stock; and that

that the Monies to arise from the Sales might be applied in the Reduction of the Petitioners' Debt, with Liberty to prove for the Remainder.

1819.

KENSINGTON,  
*Ex parte.*

The Petition was resisted on the Ground that there was no Agreement either written or verbal, that this Deposit, in *March 1805*, should be a Security to the new House, formed afterwards by a Change of the Firm, and that the Stock was within the Statute of *James I.*; the Books at the Bank being the Evidence of the apparent Ownership.

*The Lord CHANCELLOR.*

In the Cases alluded to, I went the Length of stating, that where the Deposit originally was for a particular Purpose, that Purpose may be enlarged by a subsequent parol Agreement, and this Distinction appeared to me to be too thin, that you should not have the Benefit of such an Agreement, unless you added to the Terms of that Agreement the Fact that the Deeds were put back into the Hands of the Owner, and a Re-delivery of them required.

In this Case a Bond was given, dated the 25th of *September 1805*, at which Time they stood with a written Contract affecting these Deeds and the Estate only to the Extent in which *Moffatt and Co.* should make Advances; but with a written Contract arising from the Bond, for a personal Obligation for the Advances, not only of that Partnership, but of any other, of which two of the original Members constituted Part. *Moffatt* retired from the Partnership, in *December* following, and this considerable Difficulty occurs in the Case; understanding alone, unless in a fair Sense amounting to Agreement, would not do. My Opinion, however, is, that if, upon the Affidavit and Examination taken together, aided by the extreme Probability of their Intention, I can collect, that what was originally deposited for one Purpose, should be held as Deposit also for the other with Reference to the Demand of the subsequent Partners, that, though by Parol, would be sufficient within these Cases.

Upon the other Question, with Regard to the Stock, my Opinion is extremely clear. When that Stock was placed in the Hands of *Hunter and Co.* it was upon a Trust, which must exist as long as the Lease to which the Agreement refers. The equitable Interest was in different Persons, one being both Trustee and *Cestui que Trust*. I do not apprehend that the Bank would take Notice of an Agreement to transfer; the Bankrupt, therefore, having only an equitable Interest, and no Power to make an actual Transfer, his equitable Interest passed by the Agreement without the legal Interest, which he could not part with.

*Ex parte Mountfort, 14 Ves. 606. Ex parte Langton, 1 Vol. 26.*

BEAL,



May 29, 1813.

BEAL, *Ex parte*.

2 Vesey and Beames, 29, 30.

Commission of Bankruptcy cannot proceed after the Death of the Party against whom it issued, without a Declaration of Bankruptcy.

**T**HE Question was, whether the Commission could proceed after the Death of the Person against whom it issued, who had not been declared a Bankrupt?

*The Lord CHANCELLOR*

Said, he conceived that the Commission could not proceed, unless the Party had been declared a Bankrupt.

*Lincoln's Inn Hall,*  
July 28, 1813.

*Ex parte* NORTHAM.

2 Vesey and Beames' Reports, Pages 124, 125.

Bankrupt permitted to petition against the Commission in *Forma Pauperis*.

**T**HE Petitioner, a Bankrupt, having presented a Petition, impeaching the Debt on which the Commission issued, prayed that he might be permitted to proceed in *Forma Pauperis*, and that Counsel and a Solicitor might be assigned him.

The Petition was accompanied by a Certificate of Counsel, that the Petitioner had just Cause to be relieved, and an Affidavit that he was not worth £5.

*The Lord CHANCELLOR* made the Order.

HEATH

HEATH, *Ex parte*.

August 17, 1818.

2 Ves. and Bramez, 240. 242.

**T**HE Petitioner was the Indorsee of a Bill of Exchange for £1621: 11s. This Petition was presented, stating that the Petitioner was, by the Neglect of his Agent in not sending his Affirmation deprived of the Opportunity of proving under the Commission against Bedford, under which a Dividend of 7s. in the Pound had been declared, and praying that the Petitioner may be admitted to prove and receive the Dividend.

Sir Samuel Romilly and Mr. Bell, for the Assignees, opposed the Petition, insisting that the Result of the Transactions between these Parties was Accommodation to the Acceptors, and controverting the Fact of Notice.

*The Lord CHANCELLOR.*

If there are complicated Engagements, and various Accommodation Transactions; no one can say whether there are Effects or not; are not short Bills (a) for Instance, Effects?

The Courts were obliged necessarily to decide, that, if Bills were accepted for the Accommodation of the Drawer, and there was nothing but that Paper between them, Notice was not necessary; the Drawer being, as between him and the Acceptor, first liable; but, if Bills were drawn for the Accommodation of the Acceptor, the Transaction being for his Benefit, there must be Notice without Effects; and if in the Result of various Dealings, the Surplus of Accommodation is on the Side of the Acceptor, he is with Regard to the Drawer exactly in the Situation of an Acceptor, having Effects; and the Failure to give Notice may be equally detrimental.

I will in this Instance give an Inquiry. It is upon the Petitioner to prove, that upon all this Complication there is nothing which the Law calls Effects.

(a) In *Wabryn v. St. Quintin*, 2 Esp. N. P. Cases, 515. Eyre, C. J. left it to the Jury to say, whether Title Deeds were Effects or not. They found in the Affirmative.

Distinction as to the Necessity of Notice to the Drawer of a dishonoured Bill; depending on the Fact, whether the Acceptor has Effects; or, whether it is if a single Transaction; or, if various Dealings, the Excess, for the Accommodation of the Drawer or Acceptor. In the latter Case Notice equally necessary without Effects.

Whether Securities, as Title Deeds and short Bills, are not Effects for this Purpose.—*Quere*.

*Ex parte*

*Ex parte WILLIAMS.*

2 *Vet. and Beames*, 255.

**P**ETITION to supersede, met by an Objection that the Commission had not been sealed.

*The Lord CHANCELLOR*

Said, he could not order a Commission to be superseded which had not been sealed; but, conceiving this to be a Case of Hardship, declared that unless it should be sealed within three Days he would not seal it.

*Wednesday, June 9,*  
1813.

STONEHOUSE and ANOTHER, Assignees of DE CAPIET, a  
Bankrupt, v. DE SILVA.

3d Vol. of *Campbell's Rep.* Pages 399, 400.

The Assignees, under a Joint Commission against *A* and *B*, in suing on a separate Contract, entered into with *A*, may describe themselves generally as the Assignees of *A*, without noticing the Name of *B*.

**T**HE Plaintiffs described themselves as Assignees of *M. De Capiet*, a Bankrupt, and declared upon a Contract entered into by him before his Bankruptcy with the Defendant.

A joint Commission of Bankrupt was put in against *M. De Capiet* and *Pereira de Sousa Caldas*, who had carried on Business in Partnership. *De Capiet* likewise carried on a separate Trade; and the Action was brought on a Contract entered into with him on his separate Account.

*Park* objected, that the Plaintiffs ought to have been denominated the Assignees of *De Capiet* and *Caldas*.

*Lord ELLENBOROUGH*.—This Action being on the separate Contract of *De Capiet*, I do not think it was necessary. The Description, as far as it goes, is true, and is supported by the Evidence; they are the Assignees of *De Capiet*, and as to all separate Transactions the Commission is separate.

ELLIS

ELLIS v. SHIRLEY.

Thursday, July 15.

3d Vol. *Campbell's Reports*, Pages 424, 425.

**T**RESPASS to try the Validity of a Commission of Bankrupt, which issued against the Plaintiff, and under which the Defendant was chosen Assignee; Plea the general Issue.

No Notice was given by the Plaintiff under Sir S. Romilly's Act.

On the Part of the Defendant they put in the Commission and the Proceedings under it, as in *Simmonds v. Knight*, Vol. L. 358.

The Plaintiff's Counsel then proposed to give Evidence to disprove the Petitioning Creditor's Debt, stated in the Deposition.

On the other Side it was contended, that by the 49th Geo. III. c. 121. s. 10. where no Notice is given, the Proceedings under the Commission, if sufficient upon the Face of them, are conclusive Evidence of the Trading, Petitioning Creditor's Debt, and Act of Bankruptcy.

Lord ELLENBOROUGH.—Where no Notice is given, the Act makes the Proceedings, "Evidence to be received of the Petitioning Creditor's Debt, and of the Trading and Bankruptcy." But I cannot give more Effect to the Depositions before the Commissioners, than to the *ipse* Testimony of Witnesses adduced at the Trial. The Proceedings are *prima facie* Evidence, but not conclusive. Where an Action is brought against Assignees by the Bankrupt, who disputes the Validity of the Commission, it is not very likely they should be taken by Surprise. At any Rate, I am of Opinion, it is competent to the Plaintiff to disprove the Petitioning Creditor's Debt.

The Evidence was accordingly received, and the Jury found a Verdict for the Plaintiff, with £20 Damages.

A new Trial was afterwards granted on Payment of Costs.

*Vide Humphries v. Cogges*, 1 Vol. 226.

In an Action by a Bankrupt against his Assignees, to try the Validity of the Commission, if there be no Notice under Sir S. Romilly's Act, the Proceedings are only *prima facie* Evidence for the Defendant, and the Plaintiff may call Witnesses to contradict the Depositions respecting the Trading Petitioning Creditor's Debt, or Act of Bankruptcy.

HENRY

Thursday, Dec. 24,  
1813.

HENRY v. LEIGH.

3d Vol. of Campbell's Reports, Pages 499. 503.

To prove the Allowance of a Bankrupt's Certificate by the Lord Chancellor, the Book kept in the Office of the Secretary of Bankrupts, in which Entries are made of the Allowance of Certificates, is not secondary Evidence.

To prove that the Defendant, who pleads his Bankruptcy, had been before discharged as a Bankrupt, after Notice to produce the former Certificate, it is enough if Witnesses state they were employed by him to solicit that Certificate, and that looking at the Entries in their Books they have no Doubt it was allowed by the Lord Chancellor.

**T**HIS was an Action against the Defendant as Drawer of a Bill of Exchange.

Pleas.—First, the general Issue; secondly, Bankruptcy. Replication to the last Plea, that the Defendant had been before discharged by Virtue of 5 Geo. II c. 30, and that he had not paid 15s. in the Pound under the second Commission (a). Rejoinder, that the Defendant had not been before discharged; and Issue thereupon.

The Plaintiff proved a Notice upon the Defendant to produce his Certificate under the first Commission, which was not produced. The Defendant's Affidavit of Conformity under that Commission, procured from the Office of the Secretary of Bankrupts, was then put in. To prove that the Certificate had been allowed by the Lord Chancellor, Mr. Church, a Clerk from the same Office, was then called: he produced a Book kept in the Office, containing an Account of the Allowance of Bankrupt's Certificates. In this, there was an Entry in the Handwriting of one Charnock, another Clerk in the Office, not called as a Witness, which stated that the Defendant's Certificate was allowed by the Lord Chancellor on the 2d of October 1803. The Mode in which these Entries are made was described to be as follows: When several Affidavits of Conformity have been filed in the Office of the Secretary of Bankrupts, a Clerk from the Office carries them, together with the Certificates, to the Lord Chancellor, who signs the Certificates in the Presence of the Clerk. The latter then writes "all" for "allowed" on the Back of the Affidavits. As soon as he has returned to the Office, he makes Entries of these Allowances in the Book kept for that Purpose. This Book is the only Register kept of Certificates being allowed. It is consulted by the Public, who wish for Information respecting the Allowance of Bankrupt's Certificates; but it is never seen or referred to by the Lord Chancellor. Neither the Secretary of Bankrupts nor his Clerks are sworn Officers.

(a) In *Wilson v. Kemp*, E. T. 1814, the Court of K. B. decided that such a Replication to a Plea of Bankruptcy is bad on special Demurreur.

*Topping*

*Topping* maintained, that in the Absence of *Charnock* this Entry was not Evidence.

1813.  
HENRY a. LEIGH.

Lord ELLENBOROUGH.—Had this Book been kept by Order of the Lord Chancellor, had he referred to it, and acted upon it, I should have held it admissible Evidence to prove the Allowance of the Certificate. But I can hardly attach to it the Authenticity of an official Document. The Entries are not made by one Person, in the Course of his official Duty, but by any of the Clerks in the Office, and none of them are sworn Officers of the Court.

The Solicitor to the Commission, and his Agent in Town, were afterwards called; they stated they had been employed by the Defendant to solicit his Certificate under the first Commission, and that looking at the Entries they had made in their Books, they had no Doubt the Certificate was allowed.

*Topping* still insisted this was not secondary Evidence, particularly as it had never been proved that the Certificate had come to the Possession of the Defendant.

Lord ELLENBOROUGH.—If the Certificate was obtained for the Defendant, I will presume that it came to his Possession; and as he does not produce it upon Notice, I think that there is now abundant secondary Evidence that the Certificate was allowed.

Verdict for the Plaintiff.

*Note.*—Neither the first Commission nor any of the Proceedings under it were produced.

HOLROYD and OTHERS, Assignees of HALL, a Bankrupt, v.  
WHITEHEAD and OTHERS.

3d Vol. *Campbell's Reports*, Pages 530. 533.

THE Bankrupt, on the 5th of August 1812, departed from his Dwelling-House, having left a Letter directed to his Wife, in  
Where a Trader  
departs from his  
Dwelling-House  
on Account of domestic Dissensions, if he makes no Arrangements for carrying on his Business in his Absence, and he foresees that, as a necessary Consequence, his Establishment must be broken up, and his Creditors must be delayed, which Events accordingly happen; he thereby commits an Act of Bankruptcy.

Stat. 19 Geo. II. c. 32, only protects Payments in Respect of Bills of Exchange after a secret Act of Bankruptcy, where the Bankrupt was liable on the Bills to the Party receiving the Money.

VOL. II.

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which

1813.

HOLROYD and  
Others, Assignees  
of HALL, a Bank-  
rupt, v. WHITE-  
HEAD and Others.

which he says, that he had taken Leave of her for ever, and that his supposed Misconduct of hers had driven him away. He told her she would be soon turned out by his Creditors; that there were 20s. in the Pound for them; but that, be it less or more, he would do with it. He concluded by desiring her to see that he took Goods out of the Warehouse in Preference. He gave directions for carrying on his Business during his Absence. He returned for a short Time on the Evening of *Saturday*, the 8th. In that Time a Creditor had called for Money, and was obliged to go unsatisfied. The Bankrupt was several Hours at Home on that day. He returned again early on *Monday* Morning, and sat the Part of that Day in a retired Room, where he had not been accustomed to sit, except when he was unwell. On the *Tuesday*, he was desired by a Creditor by his own Orders; and a Commission of Bankruptcy was issued against him.

The Defendants were his Bankers. On the *Saturday*, without knowledge of his Insolvency, they had paid a Bill of Exchange accepted by him, payable at their House, for which they had the Funds of his in their Hands. For the Purpose of reimbursement he sent them, at nine o'Clock on the *Monday* Morning, the money to recover which this Action was brought.

*Shepherd*, S. G. contended, 1st, that there was no Act of Bankruptcy before the Payment of the Money; and 2dly, that the Payment was protected by 19 Geo. II. c. 32.—1. The Bankrupt departed from his Dwelling-House on the *Wednesday*, not with Intent to delay his Creditors, but because he had quarrelled with his Wife.

*GIBBS*, C. J. observed, that the Bankrupt might be considered to have committed an Act of Bankruptcy by departing from his Dwelling-House on the *Wednesday*, although the Step which he took was attended with domestic Dissensions. He evidently contemplated his Trading as at an End; he had no Intention to return; he left no Directions for his Business was to be carried on in his Absence; he desired that no Preference should be shewn to his Creditors. One of them called on him, he was away, and appears to have been delayed. It was not that he left his Property behind, even if he believed that it would produce 20s. in the Pound to all his Creditors. They had a Right to it by his Person. Where Creditors have been delayed, it has been held to have committed an Act of Bankruptcy, although it was not his principal Motive, as he must be supposed to foresee the necessary Consequences of his own Act (a). Upon the Case, the Chief Justice directed the Jury to say, whether

(a) *Ex parte Osborne*, 1 Vol. 301. N.

believed that the Bankrupt left his House with Intent to delay his Creditors, and whether they found as a Fact, that a Creditor was thereby delayed. His Lordship observed, that in his own Opinion there was a sufficient Act of Bankruptcy, if the Bankrupt left his House with Intent to delay his Creditors; but he wished to give an Opportunity to take the Opinion of the Court upon this Question, if the Jury should think that no Creditor was in Point of Fact delayed (a). With Regard to the second Point, he expressed himself clearly of Opinion, that the Payment, if made after an Act of Bankruptcy, was not protected by the Statute. He considered 19 Gen. II. c. 32, only to apply to Goods sold, or to Cases where the Bankrupt was liable on the Bill of Exchange to the Party receiving the Money. In this Instance the £250 was sent as the Repayment of a Loan, and not to discharge the Bankrupt's Liability on a Bill of Exchange (b).

(a) *Robertson v. Liddell*, 9 East. 487. *Es*  
*per Osburne*, 1 Vol. 391.

(b) See *Samplin v. Diggins*, 2 Campb. 312.

1815.

HOLROYD and  
Others, Assignees  
of HALL, a Bank-  
rupt, v. WHITE-  
HEAD and Others.

On the second Point the Solicitor General, in Easter Term, 1814, moved the Court for a new Trial. The Court concurred with the Chief Justice in his Ruling at N. P. and refused to grant it.

*Holroyd v. Whitehead*, 1 *Marshall's Reports*, 128. 130.

FLOOD v. FINLAY.

Nov. 12, 1811.

Vol. II. *Ball and Beatty's Reports*, Pages 9. 16.

THE present Bill was filed praying a specific Execution of an Agreement to the Plaintiffs, as Assignees of the Bankrupt. This was resisted on the Part of the Defendant. First, on the Grounds that the Assignees of a Bankrupt were not entitled to a specific Performance of an Agreement for a Lease. Secondly, That it was a mere Family Arrangement, to allow Mr. *Blackwood*, the Bankrupt, to live in the Mansion-House and Demesne, and that he was not to alien or sell his Interest under the Agreement. These Facts were proved.

The Assignees of a Bankrupt are not entitled to the specific Execution of a Contract for a Lease, entered into with a View to the personal Accommodation of the Bankrupt.

The Lord CHANCELLOR (a).

It is not necessary for me to decide the abstract Question, whether the Assignees of a Bankrupt cannot, in any Case, be entitled to a Decree for a specific Performance of an Agreement for a Lease,

(a) Lord *Manners*.



1811.  
  
 FLOOD v.  
 FINLAY.

entered into with the Bankrupt; as I am satisfied, that it would be contrary to the Intention of the Parties, and to the Justice of the Case, to give that Relief to the Plaintiffs in this Cause. It is perfectly clear to my Mind, that this was merely a personal Accommodation to Mr. *Blackwood*; and if he had called upon the Court for an Execution of the Articles, it would have been competent for Mrs. *Finlay* to have insisted upon a Covenant against assigning or alienating the Term without her Licence.

February 13, 1812.

DEEY, *Ex parte*.

Vol. II. *Ball and Beatty's Reports*, Pages 77. 80.

Interest out of a Surplus in Bankruptcy, given to Judgment Creditor, from the Date of the Commission to the Time when the principal Sums were paid, notwithstanding the Securities were at the Time delivered up to the Assignees, with Receipts in full indorsed on them, the Creditors apprehending the Estates would not produce a Surplus, which proved to be a Mistake.

THE Petition presented by *Christopher Deey*, a Judgment Creditor of *William Montgomery*, a Bankrupt, stated; that a Commission of Bankruptcy issued against *William* and *Thomas Montgomery*; that, in 1780, the Petitioner proved the Amount of his Judgment Debt under the separate Commission of *William Montgomery*; and in February and November of that Year received two Dividends, amounting to sixteen Shillings in the Pound; that, in April 1793, a further Dividend of four Shillings in the Pound being made, the Petitioner indorsed on the Deed of Assignment of the Judgment a Receipt "in full for the with-  
 "in Debt," and delivered up the Deed to the Assignees; that, in November 1811, certain real Estates of *William Montgomery*, the Sale of which had, up to that Time, been delayed by Objection to the Title, were sold for £25,000. The joint Creditors were paid twenty Shillings in the Pound, but not until June 1811, after which there remained a Surplus of £12,000 undisposed of. The Petition prayed that *Deey* might be paid by the Assignees of *William Montgomery* his Demand for Interest.

*The Lord CHANCELLOR (a).*

I am of Opinion, that the Petitioner and the other Judgment Creditors of *William Montgomery* are entitled to Interest from the Date of the Commission to the Time they received the Principal of their Debts; but not beyond that Period. The Receipts were given under an Impression, that the Estates of the Bankrupts would not produce any Surplus. This has, however, proved to be a Mistake, and I do not conceive Receipts amount to any Thing further, than ascertaining the Amount of the Sums actually received.

(a) *Lord Mansfield.*

CRUMP

CRUMP v. TAYLOR.

Wednesday,  
June 22.

1 Price's Reports in the Exchequer, 74. 76.

**J.** PARKE had obtained a Rule *Nisi*, calling on the Plaintiff to shew Cause why the Defendant should not have a Fortnight after the 25th of June instant, to surrender in Discharge of his Bail, and that in the mean Time all further Proceedings should be stayed. The 25th of June had been appointed for the Defendant to surrender and finish his Examination.

In the Case of a Bankrupt charged in Execution, the Court will enlarge the Time for his Surrender in Discharge of Bail, notwithstanding the Provision in the Statute of 49 Geo. III. permitting a Bankrupt in Custody in Execution to be brought before the Commissioners.

**W. E. Taunton** shewed Cause, and objected that the 49 Geo. III. had removed the Inconveniences, on which alone such Indulgence could be granted, by permitting the Bankrupt in Custody in Execution to be brought before the Commissioners.

**Thomson, Chief Baron.**—I had at first some Doubt that the Application was now necessary, since the 49 Geo. III. c. 121; but it appears to me that this Case comes sufficiently within the Reason of those, where the same Indulgence has been granted by the other Courts (a).

Rule absolute.

(a) *Mauk v. Jewett*, 3 East. 145. *Glenning v. Robinson*, 1 Tunn. 220. *Woolf v.*

*Taylor*, in the K. B. since the passing of the Act.

COLDWELL v. GREGORY.

Wednesday,  
June 29.

1 Price's Rep. 119. 130.

**I**N May 1813, it was agreed between the Bankrupt, who (carried on the Trade of a Carpenter as his principal Trade), and the

The Share of a secret Partner in the joint Stock in

Trade, being in the Possession of an apparent Partner, and the sole ostensible Trader, is not liable to the Bankruptcy of the latter as being within the Meaning or Mischief of the 21st of J. I. c. 19: the Bankrupt having such an Interest and qualified Property in the secret Partner's Share, as to destroy the essential Requisites of a true and independent Ownership, on the one Hand, and of a fraudulent and reputed Ownership on the other.

Defendant,

COLDWELL v.  
GREGORY.

Defendant, that they should become Partners in the Brick-making Business for that Season, and that the Bricks should be made on their joint Account. The Name of the Defendant at his Request was not used therein: and the Bankrupt appeared to the World to be the sole Owner; but Part of the Capital was advanced by the Defendant, and all the Bricks, as between themselves, belonged to their joint Account. On the 8th November 1813, the Partnership Accounts were balanced by Bankrupt and Defendant, and it was agreed that the Partnership should be dissolved, and that the Defendant should have for his Share 74,000 of the Bricks, then on the Brick-making Premises, and that the Bankrupt should have the Remainder for his Share, and should pay the Partnership Debts. The Bricks were not set apart in Pursuance of this Agreement, but remained on the Premises. Between the 23d of November and the 9th of December (the Act of Bankruptcy being on the 12th of November, and the Commission on the 4th of December) the Defendant carried away from the Premises 31,500 Bricks, and on the 3d of January 1814, he carried away from the same Place 35,350 Bricks; these Bricks had been made by the Bankrupt, and as between him and the Defendant, were the Property of the Partnership, but had remained apparently in the exclusive Possession, Order, and Disposition of the Bankrupt under the Circumstance before mentioned, and he was the reputed Owner thereof.

A Verdict had been found for the Plaintiff the Assignee, subject to the Opinion of the Court on the above Case:

THOMSON, Chief Baron, now delivered the Opinion of the Court. The short Case here is, that the Bankrupt and the Defendant were actually Partners in the Goods in Question. The Bricks were therefore the joint Property of both, as Tenants in common, and the Possession of the Defendant was the Possession of the Bankrupt. It is a very different Case where there is no Partnership between the Bankrupt and the Person claiming to be interested; otherwise there would be an End of what are called sleeping Partnerships altogether, which are now carried on to so great an Extent. If under this Statute, wherever joint Property is taken by the Assignee of a Bankrupt under a separate Commission, you deprive a solvent Partner of his Property, with what is he to pay the Partnership Debts? which he is still liable to be called on for. It would be a monstrous Thing to say, that if an Individual in a Firm become Bankrupt the other solvent Partners may be stripped of their Property, and thus be deprived of the Means of satisfying the Partnership Debts. Our Opinion is, that there is no Ground for the Action.

Postea to the Defendant.

HAWKINS v. RAMSBOTTOM.

July 24, 1814.

1 Price's Rep. 138. 141.

**T**HE Point is correctly stated in the marginal Abstract.

THOMSON, Chief Baron, in delivering the Opinion of the Court, observed:—The Power of Sale is given to *Hawkins and Phillips*, in the Event of the Money not being paid upon their giving *Matthew Phillips* six Months Notice in Writing. It is not contended that any such Measures have been taken. The Question is, whether the Title is free from Claim by the Assignees of *Matthew Phillips*? and as there is nothing to bar them of their Equity of Redemption, their Concurrence is necessary to the Conveyance of the Premises. The Exceptions must be allowed.

Equitable Mortgagees under a Deposit of Title Deeds cannot effect a valid Assignment of the Premises comprised therein, in the Event of the Person pledging becoming bankrupt, unless the Assignees of the Bankrupt join in the Conveyance, although a Power of Sale be given by the

Agreement entered into at the Time of the Deposit, on Notice to repay the Money intended to be secured. No such Notice had been given.

STANIFORTH and ANOTHER, Assignees, &c. v. FELLOWS (a).

Monday, May 9.

1 Marshall's Reports in Common Pleas, 1814. 190.

**T**HE Bankrupts, *Hibbers and James*, had been Partners with *Christopher Busch*, against whom no Commission had issued. The House of *Hibbers and Co.* were considerably indebted to the Defendant, who was a Broker, for Money advanced and Bills accepted by him: being so indebted, they applied to the Defendant to discount Bills to the Amount of £5000 for them; which Sum, by the mutual Agreement of the Parties, was to be returned to *Hibbers and Co.*, and to be used in taking up the Bills, for which they and the Defendant were responsible: after the Defendant had received these Bills, not being

Three Partners, *A, B, and C*, delivered Bills to *D*, for a special Purpose; *A* and *B* became Bankrupts. In an Action by their Assignees against *D*, for the Proceeds of the Bills: Held that *C* not having been made bankrupt, this was not a Case of mutual Credit.

dit within 5 Geo. II. c. 30. s. 18. so as to entitle the Defendant to set-off the Bills against a Debt due to him from *A, B, and C*.

(a) The Action was brought by the Assignees of the Bankrupt, and *Busch* the solvent Partner. They declared on the Case, with a Count in Trover.

able

1814.  
 STANIFORTH and  
 Another, Assignees,  
 &c. v. FELLOWS.

able immediately to discount them, he learnt that it would be impossible for *Hibbers* and Co. to carry on their Business any longer, though they had not yet committed an Act of Bankruptcy; he therefore determined not to pay back the Proceeds of the Bills, but to keep them in Liquidation of his Claim upon that House. It was contended, on the Part of the Defendant, that he was justified in so retaining the Proceeds. The Plaintiffs, on the other Hand, insisted that the Bill having been delivered to the Defendant for a special Purpose, he has no Right to apply them to any other. The learned Judge (a) told the Jury; that if the Defendant had entered into an Engagement to pay over the Proceeds, he was not entitled to retain them to his own Use; and therefore, if they should be of that Opinion, they must find their Verdict for the Plaintiffs, which they accordingly did.

And now, upon an Application for a new Trial, Mr. Serjeant *Be* and Mr. Serjeant *Vaughan* cited and relied upon *Atkinson v. Elliott* (b) and the Stat. 5 Geo. II. c. 30. s. 28, relating to mutual Credit.

The *Solicitor-General* and Mr. Serjeant *Lens*, *contra*, distinguished this from the Case of *Atkinson v. Elliott*; they observed, that the utmost that could be pretended was, that this was a Case of mutual Credit; but the Statute of 5 Geo. II. c. 30, only related to Cases of Bankruptcy and it never could be extended to Cases where Part of a Firm only had been made bankrupt.

*Lord Chief Justice GIBBS*.—It is perfectly certain that the Defendant's Claim cannot be supported by a pecuniary Set-off, nor under Colour of mutual Credit, unless the Case fall within the Stat. 5 Geo. II. c. 30. The Statute only relates to mutual Credits between Bankrupts and other Persons; here, if any Credit existed, it was between the Bankrupts, together with a solvent Person on the one Side, and the Defendant on the other; for we must suppose that Person to have been solvent, who was not made bankrupt. It follows, therefore, that the Defendant has given no Answer to this Action. We do not enter into the Question, whether the Defence which has been set up, supposing all the Partners to have been Bankrupts, would have been a good one we found our Judgment on the Ground that the Statute does not apply.

Mr. Justice *HEATH*, Mr. Justice *CHAMBERE*, and Mr. Justice *DALZ* concurred.

(a) *Manfield*, C. J.

(b) 7 T. R. 378.

FIDGEON and OTHERS, Assignees of BECHER and BARKER,  
v. SHARP.

Tuesday, May 10.

1 *Marshall's Reports*, 196. 204.

**T**ROVER, by the Assignees of *Becher and Barker*, Bankrupts, to recover the Value of a Quantity of Goods under the following Circumstances:—The Bankrupts had purchased the Goods of the Defendant on the 8th of October 1812; on the 16th, finding that they should be obliged to suspend Payment, and that they should be unable to apply these Goods to the Purpose for which they had purchased them, they determined to return them to the Defendant, which was accordingly done: on the next Day, the 17th of October, they stopped Payment; but so far from contemplating Bankruptcy, they expected an Overplus of £17,000 from the Return of an Adventure in *Russia*, which had been delayed; and they had no Doubt but that their Creditors would have given them Time. In that Expectation, however, they were disappointed. The Act of Bankruptcy was committed on the 20th of October, and the Commission issued on the 2d November following.

Mr. Serjeant *Best* contended, that the Law relating to the Contemplation of Bankruptcy had never been extended to such a Length as to embrace the present Case.

The Chief Justice (a), in giving his Direction to the Jury, observed, that the only Question was, whether *Becher and Barker* had disposed of the Property in fraudulent Preference of one Creditor to the Detriment of the Rest. This had always been confined to Payment or Delivery, in Contemplation of Bankruptcy. It was only from the Bankrupt Laws, the Policy of which was, that all the Creditors should be paid alike, that the Illegality arose. His Lordship concurred in the Opinion of Lord *Ellenborough* (b), that this Doctrine had been carried full far enough. The Question therefore for the Jury was, whether the Delivery in the present Case, were in Contemplation of Bankruptcy? and they would consider how far the Knowledge of a temporary Suspension of Payment was Evidence of such Contemplation.

The Jury found a Verdict for the Defendant, on the Ground that the Bankrupts neither contemplated Bankruptcy nor Insolvency.

A purchases Goods of *B*, on October 8, for the Purpose of Exportation; but finding that he must stop Payment, and that he cannot apply the Goods to the Purpose for which they were bought, he returns them to *B* on October 16. On the 17th he stops Payment, but expecting Remittances from Abroad, more than sufficient to pay his Debts, has no Doubt but his Creditors will give him Time. They, however, refusing, he is made bankrupt on November 2.

In an Action by the Assignees against *B* for the Value of the Goods, held that the Jury were warranted in finding that the Delivery of the Goods to *B* was not made in Contemplation of Bankruptcy.

(a) *Sir V. Gibbs*.

(b) *Crosby v. Crouch*, 2 Camp. R. 100.

FIDGEON and  
Others, Assignees of  
BECHER and  
BARKER, v.  
SHARP.

The *Solicitor-General* and Mr. Serjeant *Lens* moved for a new Trial, contending that the Facts amounted to a Contemplation of Bankruptcy.

Mr. Serjeant *Best* and Mr. Serjeant *Vaughan*, *contrâ*, cited *Smith v. Payne* (c), *Hartshorn v. Stodden* (b), to shew that this was a Question entirely for the Consideration of the Jury.

*Lord Chief Justice GIBBS*.—As the Jury have found, that the Bankrupts had neither Insolvency nor Bankruptcy in their Contemplation, it will be unnecessary for me to say, whether the former would have rendered the Transaction illegal. But it is contended, that the Evidence raised a necessary Inference, that they had Bankruptcy in their Contemplation. I cannot concur in that Conclusion. The general Principle of the Bankrupt Law is, that all that is done before the Act of Bankruptcy is legal. A Class of Cases however has decided, that certain Acts are in Fraud of the Bankrupt Laws, though committed before the Act of Bankruptcy. Looking at the Grounds on which these Cases have been decided, from *Fordyce's Case* to the present, it has been held, that the Payment or Delivery must be in Fraud of the Bankrupt Laws, and with a View of giving a Preference to one Creditor; not only must it have a Tendency to contravene the Bankrupt Laws, but it must have been made with that View. The latter Point must be a Question for the Jury; and I left it to their Consideration, whether Bankruptcy were in the Contemplation of the Parties at the Time of this Transaction; not that I altogether exclude from my Consideration the Question of Insolvency; but, though it may be a strong Presumption, it still is but a Step towards the Contemplation of Bankruptcy.

Mr. Justice *HEATH*, Mr. Justice *CHAMBER*, and Mr. Justice *DALLAS* concurred in thinking, that it was a Subject proper for the Consideration of the Jury; that it had been properly left to them in Point of Direction; and that the Verdict was justified by the Evidence.

(a) 6 T. R. 152.

(b) B. and P. 582.

## ABSTRACT OF CASES

PUBLISHED SINCE THE PRECEDING SHEETS WERE  
PRINTED.

### BOVIL v. WOOD.

2 *Maule and Selwyn*, 23. 26.

**ASSUMPSIT:** Plea, that the Promises were made jointly with one *Thomas Dougson*, who is still living: Replication, that *Thomas Dougson* had, before the Commencement of the Action, become bankrupt, and obtained his Certificate. Demurrer. Joinder.

Joint Contractors must be all sued, although one has become bankrupt and obtained his Certificate; and if not sued the others may plead in Abatement.

*Per Curiam*,

Judgment for the Defendant.

### KENSINGTON v. CHANTLER.

2 *Maule and Selwyn*, 36. 38.

**MONEY** given by a Father, a Trader, to his Son to advance him in a Partnership Trading Concern, is not within 1 Jac. 1. c. 15. s. 5.; and cannot be recovered from the Son by the Assignees of the Father; who afterwards becomes bankrupt (a).

The Undertaking of the Plaintiff, upon the usual Rule for bringing back the Venue to *Middlesex*, is satisfied by the Production of the Commission of Bankruptcy tested at *Westminster*.

(a) *Ex parte Shorland*, 7 Ves. 88. S. P.



## MARTIN v. BUCKNELL.

2 Maule and Selwyn, 39. 42.

The Obligee of a Bond given by a Principal and Surety, conditioned for the Payment of Money by Instalments, who has proved under a Commission against the Principal the whole Debt, and received a Dividend thereon of 2s. 7d. in the Pound, may recover against the Surety an Instalment due, making a Deduction of 2s. 7d. on the Amount of such Instalment; and the Surety is not entitled to have the whole Dividend applied in Discharge of that Instalment, but only rateably in Part Payment of each Instalment as it becomes due.

**D**EBT, on a joint and several Bond, by one *Gardiner* and the Defendant, conditioned for the Payment by *Gardiner* to the Plaintiff of £9000, with Interest half-yearly at five per Cent. at the Times and in Manner following; that is to say, £600 on the 25th March 1810, and the like Sums on the same Day, in the six successive Years; the Sum of £1000 on the 25th of March 1817, and the like Sums on the same in the three successive Years following; and £800 being the Residue of the said £9000 on the 25th March 1821, together with all Interest and Arrears of Interest that might be then due, &c. The Defendant pleads Payment, that on the 20th February 1813, *Gardiner* became bankrupt (the 1st, 2d, and 3d Instalments having been regularly paid, and the 4th not being then due), and before the 25th of March 1813 (the Day on which the fourth Instalment became due) the Plaintiff received from the Estate of *Gardiner*, as and for a Dividend upon his Proof upon the Bond (a), a Sum exceeding the Amount of the fourth Instalment, with all Interest then due; and so he concludes, that the Bond and Condition hath been in all Things well and truly performed by Payment of the said several Instalments so due.

The Question for the Opinion of the Court (b) was, whether the Obligee was as against the Surety, at Liberty to apply what he had received under the Bankrupt Commission, rateably to the Instalment then due, and to the future Instalment to become due; or whether he was bound, in the first Instance, fully to discharge the Instalment which had become due, and upon which the Action had been brought.

*Lord ELLENBOROUGH*, C. J.—It must be taken according to the Nature and Reason of the Thing; that is, as each Instalment becomes due, 2s. 7½d. in the Pound is to be deducted out of it. It might make a material Difference to the Plaintiff, whether he is to recover on the Instalment now due, or to wait for a future Instalment; for before that grows due the Surety might become insolvent.

*BAYLEY*, J.—The Surety is benefited by this Dividend, for he has a Right to deduct 2s. 7½d. in the Pound out of each Instalment.

(a) The Plaintiff proved 7200*l.* as due upon the Bond, and received a Dividend of 2s. 7½*d.*, amounting to 948*l.*

(b) A Verdict had been found for the Plaintiff subject to a Case.

BUSS v. GILBERT.

2 *Maule and Selwyn*, 70, 71.

**I**N this, an Action for seducing the Plaintiff's Daughter, the Plaintiff obtained a Verdict in *August* 1812; on the 2d of *November* a Commission issued against the Defendant; the Act of Bankruptcy being on the 12th of *October*, and he obtained his Certificate on the 10th of *April* 1813: on the 30th of *June* following the Plaintiff signed a final Judgment, and took the Defendant in Execution.

A Debt due on a Judgment, signed in an Action for Damages, after an Act of Bankruptcy committed by the Defendants, and a Commission issued thereon, is not discharged by the Certificate, though the Verdict was obtained before the Bankruptcy.

*Comyn* moved for a Rule *Nisi* for discharging the Defendant out of Custody, contending that the Debt by Judgment had Relation to the Verdict, which was prior to the Act of Bankruptcy, and therefore the Certificate would discharge it.

The Court refused the Rule.

*Lord ELLENBOROUGH*, C. J., saying that he thought it was governed by the Case of *Ex parte Charles*, *ante*, 1 Vol. 372.

GOLDSCHMIDT v. LYON.

4th *Taunton's Rep.* 534. 541.

**A** BROKER, who is indebted to the Assignees of a Bankrupt, for Premiums due to them upon Policies subscribed by the Bankrupt before his Bankruptcy, is not entitled to set-off Returns of Premiums due upon the Arrival of Ships which have arrived since the Bankruptcy.

MINETT

## MINETT v. FORRESTER.

4th Taunton's Rep. 541. 545.

**A**N Insurance Broker, who is indebted to the Estate of a Bankrupt Underwriter for Premiums cannot, without an especial Authority, set-off against that Debt, Sums due from the Underwriter for the Return of Premiums, whether the Returns became due before the Bankruptcy or after the Bankruptcy.

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For the Principle of the two last Cases, see *Parker v. Smith*, ante, 120.

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## HOARE, Assignee of PARNELL, v. CORYTON.

4th Taunton, 460, 562.

To prove a Petitioning Creditor's Debt, an Account signed by the Bankrupt, charging himself with a Balance brought over on a Day before the Bankruptcy, is not admissible Evidence, without Proof that the Bankrupt allowed the Account before the Bankruptcy.

**T**ROVER by the Assignees of a Bankrupt. To prove the Petitioning Creditor's Debt, the Plaintiffs produced an Account (signed by the Parties) containing the following Entry: "1807, October 31st. To Balance brought over, £835: 10s. : 4d. John Hoare, Christopher Parnell." It was proved that the Account was acknowledged by the Bankrupt after the Balance was struck; but not that the Balance was acknowledged or signed at the Date, or at any Time before the Commission of Bankruptcy. It was objected at the Trial, that the Account ought to be shewn to be made before the Bankruptcy; and as there was no Proof when it was made, it was inadmissible.

GRAHAM, B. thought this was *prima facie* Evidence to go to a Jury and accordingly left it to them, and they found for the Plaintiff.

*Lens*, Serjeant, obtained a Rule for a new Trial, and *Pell*, Serjeant shewed Cause against it.

MANSFIELD, C. J.—The Materiality of this Paper depends upon it being acknowledged before the Bankruptcy; that must be proved by Evidence *shewing* the Paper.

GIBBS, J. concurred.

Rule absolute for a new Trial.

*The Reader is requested to annex the following Note to the Case of Ex parte YOUNG, in the Matter of SLANEY.*

The Principle partially developed in the above Case, has been subsequently recognized by the Lord Chancellor, to the full Extent of the abstract Proposition: *viz.* That a solvent Partner is entitled to prove against the Estate of a bankrupt Copartner, the Amount of the Balance due to him upon the Partnership Account; first satisfying the Partnership Debts, or indemnifying the Bankrupt's Estate against them: nor does it affect this Right, that the Payments by the solvent Partner were not made till after the Bankruptcy.

*Ex parte Taylor, in the Matter of Elgar.*

*Ex parte Ogilvy, in the Matter of Wilson.*



# CASES

## IN

### BANKRUPTCY, &c.

#### PRACTICE.

LINCOLN'S  
INN HALL.  
*Sittings after  
Trin. Term,*  
1814.

**A**FFIDAVITS in Support of Petitions filed subsequently to the Petition Day, were considered to be for that Reason inadmissible, the Reading of them objected to, and the Objection allowed; this has occurred so frequently, as to render it necessary to notice it as the Practice in Bankruptcy.

So also upon a Petition to pay Dividends (a) upon a Debt proved, the Order of Dividend has been received as in itself establishing the Petitioner's Case; nor has it been considered an Answer to the Application, that a Petition has been presented by the Assignees, and is in the Paper for the Purpose of having the Proof of the Debt expunged. The Practice, therefore, has been to make the Order for the Payment of the Dividend, but to re-

(a) Under the 49th Geo. II. c. 121. s. 12. which directs that no Action shall be brought for Dividends, but that on Petition the Assignees may be compelled to pay it; and if the Case shall require it, with Interest and Costs.—Vide *Ex parte Graham*, 1 Vol. 456.

VOL. II.

M

serve

1814.  
PRACTICE.

serve the Question of Costs until the Hearing of the Petition to expunge. *Ex parte Whitwell* in the Matter of *Hutchins, &c.*

Where a Bankrupt has petitioned to supersede his Commission, and no Act of Bankruptcy appears upon the Proceedings, if the Court thinks fit to permit the Assignees, or petitioning Creditor, to try the Question whether or not there were any Acts or Act of Bankruptcy, in an Issue or an Action, it will require that they should, previously to the Trial, deliver to the Bankrupt a Particular of the specific Acts or Act of Bankruptcy, on which they intend to rely. *Ex parte Sherwood, &c.*

It is understood that the Vice-Chancellor has not Jurisdiction to supersede a Commission of Bankruptcy.

*Michaelmas*  
*Term, 1814.*

*Ex parte* THE BURTON BANK, *Ex parte* HARFORD.—In the Matter of WHITEHEAD.

THESE were Petitions presented in the Bankruptcy of Messrs. *Whitehead, Howard* and Co., Bankers in London, by their Correspondents in the Country, for the Purpose of having certain Short Bills of the Petitioners, which were in the Possession of the Bankrupts at the Time of the Bankruptcy, delivered up—indemnifying the Bankrupt's Estate against its Liability for the Petitioners.

The Right was considered to be so indisputable that the following Orders were taken by Consent.

*Ed*

*Ex parte* HARFORD.

The provisional Assignee to retain the Cash Balances, and the Cash received on the Short Bills paid; and also a sufficient Number of the Short Bills unpaid, to cover the Amount of *Whitehead* and Co.'s Acceptances; and he is to deliver over to *Harford* and Co. the Residue of the said Bills, Notes, and Securities. It is further understood that the Cash and Notes retained are to be given up, as *Harford* and Co. produce the Acceptances cancelled,

1814.  
*Ex parte*  
 The BUR-  
 TON BANK,  
*Ex parte*  
 HARFORD.  
 —In the  
 Matter of  
 WHITE-  
 HEAD.

*Ex parte* THE BURTON BANK.

The provisional Assignee consents that all the Bills, &c. shall be delivered up, upon the Petitioner leaving such Sum as, together with the Cash Balance, equals the Acceptances outstanding.

*Note.*—An Extent had been issued on the Part of the Crown, but there was enough to satisfy it without resorting to the Short Bills, nor were they scheduled among the Property seized under it.

*Ex parte Rowton*, in the 15. The *Boldero* Cases, *Ibid.*  
*Matter of Brickwood*. 1 Vol. 232.



LINCOLN'S  
INN HALL  
Aug. 1814.

That there is a prior separate Commission in *Ireland*, in Prosecution against one of two Partners, is not a Ground for superseding a joint Commission against them in this Country.

Where the Commissioners refused to proceed in the Bankrupt's Examination, unless he produced his Books, &c. which were in the Office of a Master of the Court of Chancery in *Ireland*, or Copies of them; an Order was made, declaring that such Books or Copies, must, if required, be produced at the Expence of the Estate.

*Ex parte* CALEB CRIDLAND.—In the Matter of CALEB CRIDLAND and BENJAMIN CRIDLAND.

**C**ALEB Cridland and Benjamin Cridland were Partners as Merchants in *England* and *Ireland*; Caleb residing and conducting the Business in *Dublin*, Benjamin at *Leicester*. On the 8th of *January* 1813, a Commission of Bankrupt under the Great Seal of *Ireland*, issued against Caleb, under which he passed his final Examination, and delivered up his Books and Papers.

On the 28th of *January* 1813, a joint Commission under the Great Seal of the United Kingdom issued against Caleb and Benjamin, directed to Commissioners at *Leicester*. Caleb attended at the Time and Place appointed for his last Examination.

The Commissioners, at the Instance of the Assignees, insisted upon the Production of Caleb's Books and Papers, or at least of Copies of them. With these Demands Caleb stated his Inability to comply; that he had not the Means of defraying the Expences of taking Copies of his Books and Papers, and of making the necessary Journeys to and from *Dublin* and *Leicester* for that Purpose without Recourse to his Friends. That the Books had lately been placed, and then were, in the Office of one of the Masters of the High Court of Chancery in *Ireland*, under an Order in a Suit instituted by the Assignees, under the *English* Commission, against those under the *Irish*.

The Petition, stating the preceding Circumstances,

nraved

prayed that the joint Commission might be superseded, or if the Lord Chancellor should not think fit to direct a Supersedeas, then that the Proceedings under the joint Commission, as against the Petitioner, might be stayed; or, if his Lordship should not think proper to stay the Proceedings, that he would be pleased to direct the Commissioners to receive a Certificate from the Commissioners in Ireland, that Petitioner had duly passed his Examination, and fully accounted for all his Property; or if his Lordship should not think proper to direct the Commissioners to receive a Certificate from the Commissioners and Assignees under the Commission in Ireland, then it prayed a Direction to the Commissioners to receive the Statement and Balance Sheet delivered by Petitioner to the Commissioners in Ireland, together with an Abstract of all his Books and Accounts in Ireland; or lastly, that his Lordship would be pleased to direct that the Assignees under the joint Commission, should pay the reasonable and necessary Charges, which might be incurred in obtaining an exact Transcript of all the Books of Account, Documents, and Writings relating to his Dealings, Trading and Property, together with his Expences in going to and returning from Ireland, and that in the mean Time his Examination might be postponed.

Mr. Hart and Mr. Montagu in Support of the Petition.

Sir Samuel Romilly and Mr. Heald, contra.

The Lord CHANCELLOR.

The Ground on which this Petition prays that the joint Commission may be superseded, viz. the Existence of a prior Commission in Ireland against one of the Partners presents a Question certainly of great Importance. Many Commissions have been supported, whether without Question I do not say, while Proceedings in other Countries

1814.

*Ex parte*

CALEB

CRIDLAND.

—In the  
Matter of

CALEB

CRIDLAND

and

BENJAMIN

CRIDLAND.

1814.  
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*Ex parte*  
 CALEB  
 CRIDLAND.  
 —In the  
 Matter of  
 CALEB  
 CRIDLAND  
 and  
 BENJAMIN  
 CRIDLAND.

Countries analogous to a Commission of Bankruptcy in this, have been previously commenced against the same Person: The *Cessio Bonorum* in *Holland* for Instance, and a Proceeding not altogether dissimilar in *Russia*. It is unquestionably true, that until lately, there has been a general Persuasion, that a Commission of Bankruptcy here, and a Sequestration in *Scotland*, might proceed together: and Lord *Hardwicke*, a very great Common Lawyer, as well as a very great Judge in Equity, supported two Commissions at the same Time.

The analogous Proceeding of a foreign Country, as in the Instances alluded to of *Holland* or of *Russia*, is open to this Observation, that though we may be acquainted with the Operation and Effect of it as a Matter of Knowledge, yet if the Object is to affect a subsequent Commission in *England*, that must depend not on our Knowledge of the foreign Law, but on the Proof of it. The foreign Process, the Similarity of its Operation and Effect, must in that Case be established as a Fact.

The Effect of the Sequestration in *Scotland*, in Competition with the Commission of this Country, has been recently considered by the House of Lords, whose Opinion was, and justly, that where the *English* Commission precedes the Sequestration, all the *Scotch* personal Estate would pass under the Commission, and therefore, under the Sequestration, the *Scottish* personal Property could not be administered. Probably the Converse would hold: but the former Proposition is clear.

The Judges of the Court of Session seem, in one of the Cases (a), to have formed an Opinion that the real Estate in *Scotland* would also be brought within the Operation

(a) *Bank of Scotland v. Cuthbert*, 1 Vol. 462.

of the prior *English* Commission. They conceived that it imposed upon the Bankrupt a legal Obligation to execute proper *Scotch* Conveyances of his heritable Property, and that the *Chancellor* would enforce that Obligation against him: it has, however, been long settled that there is here no such Jurisdiction. In that Case the actual Difficulty did not arise: the Bankrupt conveyed: so that the Sequestration in *Scotland* had, upon general Principles, no personal Estate, and by the Conveyance of the Bankrupt no real Estate, on which it could operate.

1814.  
*Ex parte*  
 CALSB  
 CRIDLAND.  
 —In the  
 Matter of  
 CALSB  
 CRIDLAND  
 and  
 BENJAMIN  
 CRIDLAND.

In the Case before the House of Lords (a) it was decided, *first*, that upon general Principles, the Commission passed all the personal Estate. *Secondly*, that the *Scotch* Acts as to Sequestration, many of which passed since the Union, were found upon Examination not only not to oppose, but by their whole Language to support the general Principles. It was held accordingly, that the *English* Commission against *Garbett* made it impossible to distribute his Effects under the *Scotch* Sequestration.

In *England* in the Case of two Commissions the Practice is settled. The *Lord Chancellor* may for Convenience supersede either of them, or restrain its coming into Competition with that whose Continuance he may consider it right to prefer; adopting either Alternative, as may be most conducive to the general Interests of the Creditors, and the convenient Administration of Justice (b). It is, however, extremely difficult to say on what Principle that Practice is founded. A Commission of Bankrupt is of Right; if one Partner has committed an Act of Bankruptcy, the Great Seal cannot withhold a Commission from a Creditor who has a Debt that will support it; and if under

(a) *Selkrig v. Davies*, *Ante*, 97. (b) *Ex parte Mason*, 1 Vol. 423.

that

1814.  
*Ex parte*  
 CALEB  
 CRIDLAND.  
 —In the  
 Matter of  
 CALEB  
 CRIDLAND  
 and  
 BENJAMIN  
 CRIDLAND.

that Commission the Conveyances are executed by the Commissioners, not only all the separate Estate of that Person, but all his Interest in the joint Estate, is by Law vested in his Assignees: that being so, with what Consistency can the Great Seal say to that Creditor, True, you have a Right to take out a Commission, but you have not the Right to retain or to prosecute it; it is with me to destroy or to restrain it? Suppose the latter Alternative adopted, how (the Commission not being actually superseded) is the Property, which by the Conveyances under it has become vested in the one Set of Assignees, transmitted to the others? Certain it is, that in the Face of all these Difficulties, Commissions, both joint and separate, have proceeded together, during a very long Period, while the Administration of Justice in Bankruptcy was committed to Persons whose Superiors in Knowledge will never appear in this Place; nor, though obvious to the Doctrine, that a second Commission against an uncertificated Bankrupt is an absolute Nullity; and that a joint Commission under such Circumstances could have no Property to operate upon, do the older Reports furnish any Instance of the Question having arisen. These Difficulties always pressed my Mind extremely, and the Conclusion I have formed is, that though I could not say upon what Principle both Commissions could subsist together, yet I was bound in many Instances not to supersede a second Commission, on Account of a former Commission subsisting, which however would not determine the Effect of the second, if the Question arose at Law.

With Regard to the present State of this Subject in the Court of *Exchequer* (a), though it has gone to a new Trial, it may return in a Shape productive of this very Question; and it is no inconsiderable Drawback, upon the Opinion

(a) *Butt v. Bilke*, in the Note at the End of this Case.

I have

**I** have entertained against the Validity of the second of two *English* Commissions, that the Lord Chief Baron, looking to Lord *Hardwicke's* Practice, thought that both Commissions might stand.

The present Petition proceeds upon the Application of the present Practice to the Case of a co-existent prior Commission in *Ireland*, and with which the Great Seal in this Country has no Concern. The *Lord Chancellor of Ireland* would refuse an Application to supersede this separate Commission, on Account of the joint Commission in this Country, unless he had the Means of administering the Affairs of the Bankrupt by a Commission under the Authority of his own Great Seal: if the *Irish Commission* is the Right of the Subject, and was duly awarded, how could he supersede it, on the Ground that there is in some other Country a Jurisdiction founded on a subsequent Proceeding, which he has no Means of enforcing against the Person of the Bankrupt, or any Part of his Property in that Part of the Kingdom.

It is too much for me to supersede this Commission. The Bankrupt may try it, and due Attention will be given to the Difficulties with which the Question is surrounded. That the Question, in such a Case as this, claims great Attention, is evident; it must be daily presented not only to this Jurisdiction, but to the Commissioners in Forms which it is not comfortable to contemplate, and other and more serious Difficulties might be suggested, which, since the Union of the three Parts of the Kingdom has taken Place, there seems to me to be no satisfactory Mode of removing, without some legislative Regulation.

Upon the other Object of this Petition, the material Observations are, that the *Irish Commission* is the first; that the

1814.  
*Ex parte*  
 CALEB  
 CRIDLAND.  
 —In the  
 Matter of  
 CALEB  
 CRIDLAND  
 and  
 BENJAMIN  
 CRIDLAND.

1814.  
 ~~~~~  
*Ex parte*  
 CALEB  
 CRIDLAND.  
 —In the  
 Matter of  
 CALEB  
 CRIDLAND  
 and  
 BENJAMIN  
 CRIDLAND.

the Books and Papers, which the *Irish* Commissioners and Assignees are at least as well entitled to inspect as the *English* Commissioners and Assignees, are in *Ireland*, in the Master's Office, in a Suit instituted by the *English* Assignees against the *Irish* Assignees. The Books are therefore in the Custody of that Court, if not for the exclusive Benefit of the *English* Assignees, yet for the Benefit both of them and the *Irish* Assignees. That they have been placed there is not the Fault of the Bankrupt; they cannot be removed by him; nor can Copies be obtained without Expence. If he were committed for not answering, and the Defect of his Answer consisted in the Circumstance that he had not brought here Books which he could not bring, or obtain Copies which he could not pay for, I could not hold his Answer unsatisfactory. What the Creditors may accomplish by their Coercion on his Certificate is their own Consideration; but supposing him to have affluent Connexions, it is not a just Principle to require him to elicit, by the Pressure of his Difficulties, the Means of bearing this Expence from the Benevolence of others.

Supposing him therefore to be as justly blameable as the Creditors have insisted he is, the Question is simply, whether he is bound to produce Books which he cannot produce, or Copies which he cannot pay for. I feel some Difficulty in regulating, by an antecedent Order, the Conduct of the Commissioners in this Examination; but my Opinion is, that, if it be true, that they insist that at his own Expence the Bankrupt shall procure Copies of these Books and Papers, they are exacting a Satisfaction which it is not in his Power to give; and the Law requires an Impossibility of no Man.

If therefore they insist on having these Copies, and which

which it is obvious may be necessary, he must be furnished with the Means of obtaining them.

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An Order was made, declaring that if the Assignees required a Production of the Books, or Copies of them, the Expence of procuring them must be paid out of the Estate; not however importing that the Books were to be produced, if the Commissioners should be satisfied with Copies. The Rest of the Petition to stand over till after the Examination.

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*Burr and others, Assignees, &c.*  
and *G. Geddes v. BILKE.*

*Geddes, Milliken, and G. Geddes,* were Partners; a separate Commission issued against *Geddes*, and a separate Commission was also issued against *Milliken*, under which respectively they were found Bankrupts, and the Plaintiffs chosen the Assignees under both Commissions. *G. Geddes* was during all these Proceedings out of the Country, but upon his Return a joint Commission was taken out against him and his Partners.

This was an Action brought by the Plaintiffs, *Burr* and others, as the Assignees under the separate Commissions, and *G. Geddes* in his own Right, to recover Damages for the Conversion of a Ship taken in Execution (a) after Acts of Bankruptcy committed by *Geddes* and *Milliken*.

The Counsel for the Defendants put in the joint Commission, and insisted that *G. Geddes* was thereby precluded from suing in his own Right.

The Counsel for the Plaintiffs contended, that the Existence of the separate Commissions against

two of the Partners rendered the subsequent joint one a Nullity.

*Thompson, C. B.* concurring with the Defendants, directed a

Nonsuit.

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The Court was moved this Term for a new Trial, upon the Point raised at the Trial. Upon making the Rule absolute, *Thompson, C. B.* observed, that upon the Trial his Opinion was, that the Commission against the three was valid until it was actually superseded, or that at any Rate it was not competent for the Persons who had submitted to it to dispute its Validity. That the Practice of applying to the *Lord Chancellor* for a Supersedeas of a pre-existing Commission was merely an Arrangement of Convenience, and that there had been many Instances of Assignees under joint Commissions sustaining Actions, although there might have been an existing separate Commission.

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The Cause was again tried before *Chambre, J.* and the Result was a Special Verdict.

1814.

*Ex parte*

CALEB

CRIDLAND.

—In the

Matter of

CALEB

CRIDLAND

and

BENJAMIN

CRIDLAND.

*Kingston, Lent*

*Assizes, 1814,*

coram

*Thompson, C. B.*

*Court of Exchequer,*

*Easter Term,*

1814.

*Kingston, Lent*

*Assizes, 1815,*

(a) This Execution was in an Action against *Geddes, Milliken, and G. Geddes*, in which *G. Geddes* was outlawed.



*Hilary Term,*  
1815.

*Ex parte* HODGKINSON.—In the Matter of  
HODGKINSON and LEE.

A Commission sustained against the following Objections. First; a joint Bond to the Great Seal had been executed by one only of the Partners. Second; one of the Bankrupts had been the Subject of two former Commissions, and although he had obtained his Certificate, yet he had not under the second paid fifteen Shillings in the Pound.

**T**HE Bankrupt *Hodgkinson* preferred the present Petition to supersede his joint Commission upon the following Grounds.

*First*, the petitioning Creditors were Partners; but the Bond to the Great Seal (a joint Bond) had been executed only by one of them.

*Secondly*, *Lee* had been twice a Bankrupt; and although he had obtained his Certificates, yet he had not under the second Commission paid fifteen Shillings in the Pound: his Person therefore and not his Property was protected; there could therefore be no joint Effects for the present Commission to administer.

Sir *Samuel Romilly* and Mr. *Montague*, in Support of the Petition, relied upon the Stat. 5 Geo. II. c. 30. s. 9. *Buckland v. Newsame* (a).

Mr. *Johnson*, *contra*, against the Objection to the Execution of the Bond by one Partner, relied upon the uniform and established Practice in Bankruptcy (b). Against the Objection in Respect of the Non-payment of fifteen Shillings in the Pound under the second Commission, upon *Hovil v. Browning*, 7 East, 154. *Ex parte Baker*, 1 Vol. 453.

*The Lord CHANCELLOR.*

The long, and, till lately, undisputed Practice of the

(a) 1 Taunt. 478. 1 Vol. 4. in the Note. (b) 2 Cooke Bl. Bankrupt

Bankrupt Office, is a very strong Argument to shew, that my Predecessors have considered this Mode of executing the Bond, as not unauthorized by the Act of Parliament. It would be mischievous now to break in upon a Practice thus recognized and acted upon: it would shake not only this, but almost all the Commissions that are in Existence at the Instance of Partners. The same Point is now before the Court of *King's Bench*, and will, I have no Doubt, be considered with Reference to these Circumstances.

1815.

*Ex parte*

HODGKINSON.

—In the Matter of HODGKINSON and LEE.

With Respect to the second Point, I have had Occasion to observe (a), that although the Act of Parliament has said, that the Certificate of a Bankrupt under a second Commission shall only protect his Person and not his future Property unless he shall have paid Fifteen Shillings in the Pound, yet it does not point out in what Manner that Provision is to be enforced. It does not vest the Property in his Assignees, nor would the Assignees as such be entitled to possess themselves of it. One Creditor may bring his Action with that Object, and if the Bankrupt plead his Certificate, may reply, that it is a Certificate under a second Commission, and that Fifteen Shillings in the Pound have not been paid. But if this were not so, as far as this Situation of Things could be made use of as an Argument for superseding the present Commission, it would be obvious to this Answer, that the superseding of a Commission is a Matter of Discretion, and the Necessity of it might be dispensed with, by an Arrangement which would give to the second Commission, the Surplus of what might be left from the Claims of the first Assignees. But as Assignees they have no Claim.

The Practice as it has hitherto stood in Respect of the

(a) *Ex parte Baker*, 1 Vol. 453.

Execution

1815.

*Ex parte*

HODGKINSON.  
—In the Mat-  
ter of HODG-  
KINSON and  
LEE.

Execution of the Bond by one Partner, is not inconsistent with many of the ordinary Occurrences in Bankruptcy: one Partner is admitted to make the Affidavit of Debt as petitioning Creditor, and to prove the Debt for himself and Partners, under the Commission; one Partner executes a Power of Attorney authorising a Person to vote for himself and Partner in the Choice of Assignees; one Partner may vote in the Choice of Assignees, and may sign the Certificate (a).

(a) *Ex parte Hall*, 1 Vol. 2.

GUILDHALL,  
10 December,  
1814.

ROBERTS v. HARDIE.

Trespass by the Bankrupt against the petitioning Creditor, the Attorney and Messenger, for seizing Plaintiff's Goods under a Commission which he alleged was illegal.

The only Evidence offered against the petitioning Creditor, was his having executed the Bond to the Great Seal, and thereby rendering himself the Origin and Foundation of the Commission.

Lord Ellenborough, C. J., rated this not to be sufficient. The Plaintiff might with equal Reason consider the Chancellor a Trespasser for having sealed the Commission.

Another Point relied on, was, that the Partner of the petitioning Creditor at the Time of issuing the Commission was adhering to the King's Enemies within Hec-

tor v. M'Connel. As to which the Evidence was, that the Partner, not aware of the War with America, went thither in the Course of his Trade, and had since remained there; but it did not appear that he was voluntarily residing there, for any commercial Purposes, or from any Motives inconsistent with his Allegiance as a British Subject.

Lord Ellenborough, C. J., thought it would be carrying *Hector* and *M'Connel* much too far to apply it to these Circumstances.

Another Objection was, that the Bond, although in Terms a joint Bond, was executed only by one of the Partners. This was stated to be merely a practical Regulation of the Bankrupt Office, not cognizable in a Court of Law, where the only Question was the Truth and Reality of the Debt.

A Verdict was taken for the Defendants, subject to a Case.

*Ex*

*Ex parte* TAYLOR.—In the Matter of ELGAR.

LINCOLN'S  
INN HALL,  
August, 1814.

**T**HIS was an Application by *Taylor*, to prove a Debt upon the Balance of the Copartnership Accounts, against the Estate of his bankrupt Copartner, *Elgar*. All the Partnership Creditors had been satisfied.

A solvent Partner is entitled to prove against the Estate of a bankrupt Copartner the Amount of the Balance due to him upon the Partnership Account, first satisfying the Partnership Debts, or indemnifying the Bankrupt's Estate against them.

Mr. *Cullen* and Mr. *Bell* supported the Application upon the Principle of *ex parte Young* in the Matter of *Slaney*(a).

Mr. ——— opposed it, distinguishing the Case cited from the present, as proceeding upon a Debt founded in Fraud (b).

*The Lord* CHANCELLOR.

If I rightly recollect the Case in the Matter of *Slaney*, the Discussion turned much upon the Point, whether the Partners, being solvent, had a Right to prove a Sum of £22,000, which, if they had become insolvent, their Assignees would not have been permitted to prove, unless the Debt had been fraudulently constituted (c). It was contended that the *Botfields* had no such Right; first, as it would be in Competition with Creditors, to whom they were liable jointly with the Bankrupt: in Fact, with their own Creditors. Next, as it would prejudice the separate Creditors by an Interference with the Funds peculiarly applicable to them. I thought it hard that the Solvency of some of the Partners, should destroy the Equity which

(a) *Ante*, p. 41.

sary to detail.

(b) There was also an Objection upon the Ground of Usury, which it is unneces-

(c) *Ex parte Harris*, 1 Vol. 437.

would

1814.  
*Ex parte*  
 TAYLOR.—  
 In the Matter of  
 ELGAR.

would have existed, if all of them had become insolvent. And further, that exclusively of the Circumstances of Fraud, which distinguished that Case from the present, it was impossible to say there was not at the Bankruptcy a State of Affairs which rendered the *Botfields* the Creditors of *Slaney*. They paid the joint Creditors. There was an End of the Objection that the Proof would be in Conflict with them. It is true, the Payment was made subsequently to the Bankruptcy: But it was in Effect an Annihilation of the joint Creditors, as before the Bankruptcy, of Claims which existed at the Dissolution of the Partnership by the Bankruptcy; and if the *Botfields* had in Fact paid this before the Bankruptcy, they would have had an equitable Right to Reimbursement, and the Propriety of the Proof would have been indisputable. Looking at it therefore independently of the Statute (a), and merely as a Claim which could have been established by a Bill in Equity, I thought the *Botfields* were entitled to the Relief which they prayed: it constituted an equitable Debt: and the Proof of equitable Debts are admissible in Bankruptcy.

Here all the Partnership Creditors being satisfied, the Petitioner is entitled to the Order.

*See the next Case.*

(a) 49 Geo. III. c. 121. s. 8. considered, if not as "a Surety," yet as "a Person liable." within which it was argued that a Partner was to be con-

*Ex*

LINCOLN'S  
INN HALL.

*Ex parte* OGILVY.—In the Matter of WILSON (a).

August,  
1814.

UPON the Dissolution of the Partnership between *Ogilvy* and *Wilson*, in 1812, the Stock, &c. were assigned to *Wilson*; he covenanting to pay the Debts, and to indemnify *Ogilvy*. *Vide the marginal Abstract of the preceding Case.*

*Wilson* became Bankrupt: the joint Creditors resorted to *Ogilvy*, who paid some of them; and the Claims of others were still depending. He prayed by the present Petition, to be at Liberty to prove what he had paid, or might pay.

Sir *Samuel Romilly* and Mr. *Cooke* in Support of the Petition.

Mr. *Hart* and Mr. *Montague*, contra.

The Lord CHANCELLOR

Was of Opinion, that, upon indemnifying *Wilson's* Estate against the joint Debts, the Petitioner was entitled to prove: and made the Order accordingly.

*See the preceding Case.*

(a) 3 *Ves. & Beames*, 133. s. c.

1815.

*Hilary**Term.*

## CARSTAIRS v. STEIN.

In an Issue,  
and in an Action  
directed by the  
Court, the  
Practice varies.

In the first  
the Motion for  
a new Trial  
must be made  
to the Court  
directing it;  
in the second,  
to that in which  
it is tried.

Nor is this  
Rule affected  
by any special  
Provisions by  
which the Di-  
rection of the  
Action is ac-  
companied.

UPON a Petition presented in the Bankruptcy of *Stein*, the *Lord Chancellor* directed that an Action should be brought against *Stein* in the Court of *King's Bench*; he not to set up his Bankruptcy; the Plaintiff and Defendant to be examined; and Books and Papers to be produced. The Action was accordingly tried.

The *Attorney General* (a) appeared in Court to move for a new Trial: previously to opening the Circumstances of the Case, he stated a Difficulty which had occurred as to the Court in which the Application ought to be made. The Motion, it was true, was founded, not upon an Issue directed by his Lordship, but upon an Action; accompanied however by such particular Directions, as gave it, in a very considerable Degree, the Character of an Issue. The Defendant, without such Directions, was incompetent to sue, or be sued; and a Mode of conducting the Action, both as the Exclusion of a particular Defence, and the Admission of particular Evidence, was provided for.

*The Lord Chancellor*

Said, there was no such Distinction: the Line was clearly drawn between an Issue and an Action. In the first Case, the Application must be made to the Court by which it was directed: in the second, to that in which the Action is brought. The Court, in the Exercise of its Jurisdiction in Bankruptcy, for Convenience and in Aid of Justice, provides by special Directions, for a satisfactory Result from the Action; and exacts that

(a) Sir William Garrow.

Information of oral Evidence, which must otherwise be obtained by Means of a Bill in Equity.

1815.

CARSTAIRS

v.

STEIN.

BUXTON v. LAWTON.

Application could only be made to the Lord Chancellor.

An Issue directed by the Lord Chancellor.

Best, Serjt. moved on Behalf of the Defendant, to put off the Trial.

Shepherd, S. G. insisted that the

Gibbs, C. J.—The Record coming down to *Nisi Prius*, I am in Possession of it as of any other Cause, and I cannot refuse to listen to the Application.—4 *Camp. Repts.* 163.

*Ex parte* STORKS.—In the Matter of EVANS (a).

THE Petition stated, that *John Evans*, who in 1808 had been a Bankrupt at *Leicester* as a Clothier, without having obtained his Certificate, had for some Time past carried on the Trade of a Haberdasher at *Aldgate* in *London*, where *Humphries*, the Assignee under the former Commission, also resided, and was fully aware of the Trading.

The Petitioners were Creditors, with whom, without any Knowledge of his being an uncertificated Bankrupt, *Evans* had contracted Debts during his Residence in *London*. Upon some of these Debts, in *February* 1814, a Commission issued against him, under which the Petitioners had seized Property, which it was alleged but for their Interference, would have been lost to the Creditors. The Property had been acquired by the Bankrupt since his Residence in *London*.

The Petitioners prayed, that as Creditors claiming under the second Commission, they might be declared entitled to the Property in Question, in Preference to the

LINCOLN'S INN HALL, Aug. 1814. In the Case of an uncertificated Bankrupt becoming the Object of a second Commission, whether subsequent Creditors are preferably entitled to the Property,—*Quære*. The Question directed to be raised by a Bill in Equity, as too important to be decided on a Petition in Bankruptcy.

(a) 4 *Ves. & Beames*, 105.

N 2

Creditors



1814.  
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*Ex parte*  
 STORKS.—  
 In the Mat-  
 ter of  
 EVANS.

Creditors who claimed under the first Commission. But, if his Lordship should be of Opinion that they were not entitled to this Preference, then that the *second* Commission might be superseded, and the Costs attendant upon the issuing and Prosecution of it, and of their present Application, might be paid out of the Property so received by the Petitioners, and the Residue paid by them to the said *Thomas Humphries*.

Mr. *Cullen* and Mr. *Montagu* contended 1st, that the Petitioners had a specific Interest in the Property to be administered under the second Commission, arising from the Conduct of the Assignee as the Representative of the first Set of Creditors: 2nd, that within the Interpretation of the Stat. 21 *Jac.* 1. *c.* 19. *s.* 11., the subsequent Property might be considered as Property left in the Order and Disposition of the Bankrupt at the Time when he became the Object of the second Commission. They cited and observed upon the Cases in the Margin (a).— But if the Circumstances of the Case did not entitle them to the full Extent of Relief sought by the first Branch of their Prayer, they were at least entitled to that prayed by the second, viz. that superseding the last Commission they should be paid their Costs incurred in the issuing and Prosecution of it.

*The Lord CHANCELLOR*

Asked Mr. *Leach*, who appeared for the Assignee under the first Commission, if he had any Objection to the latter Alternative.

(a) *Ex parte Brown. Trough-* *Martin.* 15 *Ves.* 114. *Everett*  
*ton v. Gitley. Amb.* 630. *Ex* *v. Backhouse.* 10 *Ves.* 94.  
*parte Mason.* 1 Vol. 423. 433. *Ex parte Bold.* 1 *Cooke's Bt.*  
 1 *Ves. & Beames.* 60. *Ex parte* *Law.* 10. *Ex parte Brown.* 2  
*Lees.* 16 *Ves.* 472. *Ex parte* *Ves.* 67.

Mr.

Mr. *Leach* objected. The Circumstance of the Bankrupt's being uncertificated was well known to these Creditors previously to the issuing of their Commission.

*The Lord CHANCELLOR.*

There certainly is, in the repeated Reluctance which the Court has evinced to dispose of similar Applications upon Petition, a strong Current of negative Authorities against the Decision of *Troughton v. Gitley*. Between the two Classes of Creditors the equitable Arrangement is difficult. Proceeding upon the Laches of the Assignee, it is hard to say, that his Conduct shall operate against the legal Rights of those who are neither implicated in nor conusant of it. In the Distribution too of the Property among the subsequent Creditors, it is not easy to say, who are the specific Creditors of the particular Property, or whose Claims ought exclusively to attach upon it.

The Question is too important to be disposed of otherwise than by a Bill ; which, if you think fit, you may have Recourse to.

1814.  
*Ex parte*  
 STORKS.—  
 In the Mat-  
 ter of  
 EVANS.

*Ex*

LINCOLN'S     *Ex parte* WARING.     }  
 INN HALL.     *Ex parte* INGLIS.     } —In the Matter of BRICK-  
*Aug.* 1814.     WOOD and Co.     And in the Matter of BRACKEN  
*April,* 1815.     and Co.

A Holder of  
 a Bill of Ex-  
 change had no  
 Lien on Pro-  
 perty deposited  
 by the Drawer  
 with the Ac-  
 ceptor, to cover  
 the Liability of  
 the latter in  
 Respect of his  
 Acceptance;  
 but on the  
 Bankruptcy of  
 Drawer and  
 Acceptor, the  
 Arrangement  
 of the Property  
 between the  
 two Estates  
 may indirectly  
 render such an  
 Equity availa-  
 ble.

**BRACKEN** and Co. were Flannel Manufacturers in  
*Lancashire*, drawing upon *Brickwood* and Co. their  
 Bankers in *London*, and remitting to them Cash and Bills  
 to cover their Liability.

*Brickwood* and Co. and *Bracken* and Co. became  
 Bankrupts, the former on the 7th of *July*, 1810, the latter  
 on the 2d of *August* following.

At the Bankruptcy of *Brickwood* and Co. they had  
 accepted Bills drawn by *Bracken* and Co. to the Amount  
 of £24,000 (of which at the Time of presenting the Peti-  
 tion £23,400 remained unpaid, but most of them had been  
 proved under both Commissions): they were indebted to  
*Bracken* and Co. in Cash £6,766 : 7s. : 6d. and in Short  
 Bills £21,645 : 10s., and they had also in their Hands  
 the Title Deeds of certain Premises in *Lothbury* and  
*Parker's Court, Coleman-street*, as a Security against  
 their Acceptances, which Premises produced by subse-  
 quent Sale the Sum of £2961 (*a*).

The Assignees of *Bracken* and Co. had, upon the  
 Petition *Ex parte Inglis*, obtained an Order, that

(*a*) The Account therefore stood thus :

*Brickwood* and Co.

Debtors.

Creditors.

Cash - - -	£ 6,766 7 6	Acceptances	£ 24,000
Short Bills	21,645 10 0		
Mortgage of an } Estate since sold }	2,961 0 0		

the

**the Assignees of *Brickwood* and Co. should keep distinct Accounts of the general Estate of *Brickwood* and Co., and of the Proceeds received or to be received by them, on Account of the Short Bills and Securities which they had received from *Bracken* and Co. : and that they might pay to the Assignees of *Bracken* and Co. such Surplus as might remain from such Proceeds, after Payment of the Dividends due to the several Holders of the Bills drawn by *Bracken* and Co. upon *Brickwood* and Co.**

Against this Order, the Holders of the Bills made an Application to the Court upon the Petition *Ex parte Waring*, alleging that the preceding Order had been obtained in Prejudice of their Rights, and without Notice to them: and praying that so much of the Order as directed the Assignees of *Brickwood* and Co. to account with and pay to the Assignees of *Bracken* and Co. the Surplus of the Proceeds received or to be received by them on Account of the Short Bills, after Payment of the Dividends due to the several Holders of the Bills, might be varied by directing the Assignees of *Brickwood* and Co. to pay to the Petitioners and the other Holders of the said outstanding Acceptances of *Brickwood* and Co. the Proceeds arising from the Short Bills, and the said Sum of £2961 ; and that they might be directed to deliver over such of the said Bills and Securities as had not been converted into Money, to the Petitioners and the other Holders of the said Acceptances, towards Payment and Satisfaction of the Money remaining due upon such Acceptances, as far as the same would extend.

Mr. *Leach* and Mr. *Cooke* for the Bill Holders contended that the Short Bills and Securities were in *Brickwood's* Hands, not merely for their Indemnity, but as a Trust specifically for the Payment of the Acceptances ;

1814-1815.

*Ex parte*

WARING.

*Ex parte*

INGLIS.—In the Matter of *BRICKWOOD* and Co. and in the Matter of *BRACKEN* and Co.

1814-1815.

—  
*Ex parte*

WARING.

*Ex parte*

INGLIS.—In  
the Matter of  
BRICKWOOD  
and Co. and in  
the Matter of  
BRACKEN and  
Co.

Mr. *Fonblanque*, Mr. *Bell*, and Mr. *Montagu*, for the  
Assignees of *Bracken* and Co. controverted.

Sir *Samuel Romilly* and Mr. *Trower*, for the Assignees  
of *Brickwood* and Co. wished to act under the Direction  
of the Court.

*The Lord CHANCELLOR.*

The Relief sought by the Petition *Ex parte Waring*,  
has been referred to this Principle. These Short Bills  
and this Mortgage having been deposited with *Brick-*  
*wood* and Co. as a Security against their Acceptances,  
the Holders of the Acceptances, it is said, have an  
Equity to have the Short Bills and Mortgages applied spe-  
cifically in Discharge of those Acceptances, on the alleged  
general Ground, that, where a Transaction of this Kind  
takes Place, those Persons whose Debts are thus situated  
have in Equity a Right to the Benefit of a Contract be-  
tween the Party indemnifying and the Party indemnified,  
though no Party themselves to the Contract; that is to say,  
that those who have contracted out of these Deposits or  
these Pledges to pay certain Debts, are liable to the De-  
mands in Equity of those whose Debts are so to be paid,  
and there is a Case in Equity that goes that Length (a). It  
is enough to say, that Doctrine is inapplicable to this Case.  
Supposing Bankruptcy not to have happened, and I

(a) *Maure v. Harrison*. 1 *A.* gives *C.* a Mortgage or  
Eq. Ca. abridged, cited in Bond to indemnify him, *B.*  
Argument, and is as follows. shall have the Benefit of it  
“A Bond Creditor shall, in to recover his Debt. *Mich-*  
this Court, have the Benefit 1692, between *Maure* and  
of all counter Bonds or col- *Harrison*.”—Of which the  
lateral Security, given by the *Lord Chancellor* observed,  
Principal to the Surety. As that he had never heard it  
if *A.* owes *B.* Money, and he relied on as a governing Case  
and *C.* are bound for it, and at this Day.

ing

t this merely as the Case of Persons dealing with Bankers, and making a Depôt of this Sort, I see ng which would entitle the Creditors to say that they an Equity attaching on these Effects, or, in other ls, that it raises a Lien of this Nature, that the Mo- the Pledge is put into the Hands of the Banker, he mes a Surety for those whose Acceptances are depo- with him; if so, the Consequence would be, that the er and the Person whose Depositary he is, could come new Arrangement' without the Consent of the Cre- 1. If this Petition therefore can be supported, it must a other Grounds; and, in the View I have of it, upon . The first Question is, what was the Nature of the and as between *Bracken* and Co. on the 7th *July*, ), the Day on which *Brickwood* and Co. became rupt: what was the Nature of the Demand at that ment which *Bracken* and Co. had on *Brickwood* and ? If they have a Right to these Bills in Preference to other Creditor, it must be by the Effect of some ity subsisting between *Bracken* and Co. and *Brick- l* and Co., rather than any direct Demand attaching ny Fund in the Hands of *Brickwood* and Co. Now if he 8th of *July*, 1810, or at any Time between that and the 2d of *August*, it was ascertained what was Demand that *Bracken* and Co. had against *Brickwood* Co., it is impossible to deny, that if *Bracken* and had relieved *Brickwood* and Co. of the Acceptances £24,000, that the Short Bills and the Mortgage must : been restored to *Bracken* and Co. On the other id, I take it to be equally clear, that *Bracken* and Co. r could have re-demanded the Short Bills or the rtgage without bringing in under the Estate of *Brick- d* and Co. Funds equal to the Claim that *Brickwood* Co. had in Respect of the Short Bills, and the Mort- e; for they were first applicable to the Discharge of e Acceptances, not for the Security of the Persons in whose

1814-1815.

*Ex parte*  
WARING.

*Ex parte*  
INGLIS.—In  
the Matter of  
*BRICKWOOD*  
and Co. and in  
the Matter of  
*BRACKEN* and  
Co.

1814-1815.

*Ex parte*  
WARING.*Ex parte*  
INGLIS.—In  
the Matter of  
BRICKWOOD  
and Co. and in  
the Matter of  
BRACKEN and  
Co.

whose Hands those Acceptances were, but for that of *Brickwood* and Co. who had become liable upon them. The Liability of *Brickwood* and Co. must be exonerated before any Restitution could be claimed by *Bracken* and Co. That being the Nature of the Question from the 7th of *July*, 1810, to the 2d of *August*, 1810, the Consideration arises, how far it is altered by the Bankruptcy of *Bracken* and Co. Now if the Assignees of *Bracken* and Co. are bound to leave the Estate of *Brickwood* and Co. in the same Condition as *Bracken* and Co. were bound to have done before the Bankruptcy, and they certainly would be obliged to put the Estate of *Brickwood* and Co. in that Condition, in Order to entitle themselves to the Securities, I do not see how the Bankruptcy varies the Question. On the best Consideration I have been able to give it, with Reference not only to the Rights of these Claimants, but of all the Creditors under the Commission, and of the Bankrupts themselves, it does appear to me, that, in this circuitous Way, the Persons holding the Acceptances are entitled to be paid, not perhaps in the Nature of a direct Demand, but as the true Way of arranging the Equities between the Estates. This brings me to the Opinion expressed by Mr. *Cooke* on a former Occasion, though at that Time somewhat different from mine: and with this Intimation of it, you will have no great Difficulty in framing Minutes that will apply to these different Petitions.

LINCOLN'S  
INN HALL,  
December,  
1814.*Ex parte* CAWTHORNE.—In the Matter of  
GREATOREX.Certificate re-  
called as hav-  
ing been ob-  
tained by  
Fraud.

THE Bankrupt had two Years ago obtained his Certificate. It had been lately discovered that the Commission had been issued fraudulently by the Bankrupt; that with his Connivance Debts had been fabricated and proved under his Commission; and that by the Preponderance

ponderance of those fictitious Creditors his Certificate had been obtained.

1814.

*Ex parte*

CAWTHORN.—  
In the Matter of  
GREATOREX.

*The Lord CHANCELLOR*

Ordered the Certificate to be recalled.

Mr. Hart and Mr. Montagu, in Support of the Petition.

Mr. Fonblanque, contra.

*Vide ex parte Tallis*, 1 Vol. had in one Day lost more  
371. Lord Macclesfield, C., than £5 by Gaming, Davies's  
Ordered a Certificate to be Bankrupt Law, 437.  
Recalled where the Bankrupt

*Ex parte COULBOURN*.—In the Matter of  
COPLAND.

LINCOLN'S  
INN HALL,  
December,  
1814.

**T**HIS was a Petition to stay a Certificate. It was lodged on the 20th of September. The Time within which it ought to have been presented expired on the 21st: the Creditor died on the 24th of the same Month. The 4th of November was the next Petition Day. On the 14th of November, the Executor proved the Will. On the 15th of November, the Petition was served.

Mr. Cullen, for the Bankrupt, objected that the Petition not having been served before the Petition Day, ought not to be heard. *Ex parte Kendall* (a).

Mr. Hart and Mr. Montagu, for the Petition, contended that this did not fall within *Ex parte Kendall*, as the Omission to serve before the Petition Day was occasioned by the Death of the Creditor: and his Executor

(a) *Ante*, 115.



1814.

*Ex parte*

COULBOURN

—In the

Matter of

COPLAND.

served it the Instant he was legally entitled to act for the — e  
Testator.

*The Lord CHANCELLOR*

Directed the Certificate to be allowed.

*Ex parte JACKSON.*—In the Matter of HEATH an —  
STEVENS.

A Bill of  
Exchange,  
on which the  
Commission  
was sued out,  
ordered to  
be left with  
the Assign-  
ees, and  
enrolled of  
Record with  
the Commis-  
sion and  
Proceed-  
ings.

THE Commission in this Case issued upon three  
Bills of Exchange accepted by the Bankrupts  
two for £100 each, and one for £150.

*Stevens* alleged that he was a Minor when the Bills  
were accepted, and brought an Action against the Petition-  
ers his Assignees, impeaching the Validity of his  
Bankruptcy on that Objection (a). A Verdict was found  
for the Defendants.

The Petition stated, that Petitioners' Solicitor had the  
Bills upon which the petitioning Creditor's Debt arose,  
left with them upon the Trial; and Petitioners having  
Reason to suspect, that *Armitstead*, the petitioning Creditor,  
was acting in Concert with (b) *Stevens* in his attempts  
to invalidate the Commission, were anxious to  
retain the Possession of the Bills, that they might have  
on any future Occasion the Means of proving the petitioning  
Creditor's Debt.

The Petitioners had returned the two Bills of £100

(a) *Vide Stevens v. Jackson*, post. and 4th Camp. N. several Circumstances from  
P. Cases, 164. which that Charge was referred.

(b) The Petition stated

each

each to *Armistead*, and offered him the Use of the £150 for any necessary Purpose: or to deposit it in the Hands of a Friend of the said *Robert Armistead* for safe Custody. These proposals *Armistead* declined, and had by his Attorney threatened to bring an Action to recover Possession of the Bills.

The Petition prayed, that one of the Bills on which the Debt of the petitioning Creditor arose might be deposited with his Lordship's Secretary of Bankrupts, not to be produced except for some legal Purpose: that the Depositions of the Proof of the petitioning Creditor's Debt, and of the Acts of Bankruptcy filed with the Proceedings under the Commission, and also one of the Bills of Exchange referred to in the petitioning Creditor's Deposition, might be entered of Record pursuant to the Act of Parliament (a): and that *Armistead* might be restrained by the Order of his Lordship from proceeding at Law against the Petitioners, or their Solicitors in Respect of the Bills.

Sir *Samuel Romilly* and Mr. *Montagu* were in Support of the Petition.

Mr. *Hart* appeared for *Armistead*, upon an Affidavit, denying the Collusion with *Stevens*; that he had given the Bills to the Solicitor for the Purpose of Production at the Trial, but without parting with his Property in them.

*The Lord CHANCELLOR*

Thought it right to make the Order. A petitioning Creditor is pledged to the Validity of the Commission, and to every Act that is necessary for its Preservation.

5 Geo. II. c. 30. s. 41.

*Ex*

1814.

*Ex parte*  
JACKSON.—

In the  
Matter of  
HEATH and  
STEVENS.

1805.  
May 15.

*Ex parte* HENDERSON.—In the Matter of  
WHESTON.

Where in a Country Commission the Bankruptcy was found on the 28th Day, but no Notice given of it at the Bankrupt Office till two Days afterwards, the Commission was held to be superseda-ble within the General Order of the 26th of June, 1793; although by the Course of Post from the Place where the Commission was opened, an earlier Communication was impossible; the Practice being uniform from the first Existence of the Order, to supersede on the 30th Day, upon an Application made on the 29th, unless Notice has been previously given on the 29th of the Adjudication.

A COMMISSION issued, directed to Commissioners at *Liverpool*. It was opened, and the Bankruptcy found on the 28th Day, which was on *Tuesday*, the 11th of *April*.

The Advertisement was by *Tuesday's* Post, sent up for the next *Saturday's* Gazette, with Directions instantly to give Notice at the Bankrupt Office that the Bankruptcy was found.

On *Thursday* the 13th, being the Day on which the Letter arrived, the Agents called at the Bankrupt Office, and gave the Notice, when they were informed that a *Supersedeas* had that Morning issued; that the Commission was superseded; and another issued.

This was a Petition presented by the petitioning Creditor under the first Commission, praying that the *Supersedeas* might be quashed, and that the Operation of the subsequent Commission might be restrained.

The Petition contained the following Allegation: "That the Commission was not opened until the 11th of *April*, in consequence of the said *J. Wheston* being desirous to come to a Compromise with his Creditors, and which almost the Whole of the Creditors were desirous should be effected."

Mr.

**Mr. Leach** and **Mr. Cooke** for the Petition, contended that by the Words of the Order (a), by the Practice, and the Decision, the Petitioner had obeyed the Order of **Lord Loughborough**. The Bankruptcy was found on the 28th Day. The Words are, "Any Commission of Bankrupt which shall be sued out, and not to be executed in *London*, shall be supersedable for Want of Prosecution at the Expiration of twenty-eight Days, and not sooner after the Date thereof." The Practice has always been to allow the full twenty-eight Days. *Ex parte Ellis*, 7 Vesey 135 (b): the only Difference between that and the present Case being, that it was there a *London* Commission, where fourteen Days only are allowed; that the Principle was the same, unless it could be contended that the Order must depend upon the Distance of the Place to which the Commission was directed.

1805.  
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*Ex parte*  
**HENDERSON**.—In the  
 Matter of  
**WHISTON**.

**Sir Samuel Romilly**, in Opposition contended, that this was a mere Matter of Practice: that it was the regular Practice to issue a *Supersedeas* on the 30th Day upon an Application made on the 29th Day, unless Notice was given on the 29th, that the Bankruptcy was found. That continued Practice was the best Explanation of the Order. That if by any other Construction it might be extended beyond twenty-eight Days, when the Bankruptcy was found at *Liverpool*, or at any other Place, similarly situated in Respect of Communication by Post, on the 28th Day, and such Day happened to be *Monday*, it could not appear until the next *Saturday*, and might not be known until the next *Monday*, which would be

(a) G. O. 26th June, and the Cases on it collected, 1793. 1 Vol. 385.

(b) *Vide* the Order stated,

1814.

*Ex parte*

HENDER-  
SON.—In the  
Matter of  
WHESTON.

thirty-five Days. That such Delay would be most mischievous.

*The Lord* CHANCELLOR,

Upon consulting the Secretary of Bankrupts, said.—The Practice, ever since the Order has existed, is as stated by Sir *Samuel Romilly*: and this Practice is the best Explanation of the Intention of the Order. In *Ex parte Ellis*, the Solicitor who issued the second Commission knew on the *Monday* that the Bankruptcy had been found on the *Saturday*, although too late to be inserted in the Gazette.

The Petition was dismissed.

At the  
Rolls,  
December  
12th, 1814.

SHARP and OTHERS, Assignees, &c. v. RHOADE.

Judgment  
Creditors  
have no Lien  
upon Lands  
articled to  
be sold be-  
fore a Bank-  
ruptcy, the  
Conveyance  
to which re-  
mains unex-  
ecuted at  
the Bank-  
ruptcy.

*WILLIAM Huffham* being entitled to the Remainder in Fee of certain freehold Premises in *Middlesex*, sold them to the Defendant; but before the Conveyance was executed, a Commission was issued against *Huffham*, and he was found a Bankrupt.

The present Bill by his Assignees, (to whom a Bargain and Sale had been duly executed of the Real Estates of the Bankrupt, and inrolled), prayed a specific Performance of the Contract.

The Defendant by his Answer raised the following — Objection to the Title, namely, that certain Creditors by Judgment duly docketed and registered, were unsatisfied before, and at the Time of the Bankruptcy; their Judgments therefore, were a Lien on the Premises.

Upon this Objection, it was referred to the Master to enquire, and state whether the Plaintiffs could make a good Title. The Master reported in the Affirmative; the Defendant excepted to the Report, and the Cause now came on upon that Exception.

Mr. Hart and Mr. Wray, in Support of the Exception, cited and relied upon *Sloper v. Fish*, 2 Ves. and Beames, 145.

Mr. Cooke, *contra*, insisted that by 21 Jac. 1. c. 19. s. 9, the Judgment Creditors had lost their Lien by the Bankruptcy; that to say it should exist against a Purchaser, would be in Effect to make it operative against the Creditors of the Bankrupt.

*The MASTER of the ROLLS*

Was of Opinion, that the Judgments were inoperative against a Title derived from Assignees under a Bankruptcy, and overruled the Exceptions, but without Costs.

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The Statute, 21 Jac. 1. c. 19, in the Section cited, provides that all and every Creditor and Creditors, having Security for his or their several Debts by Judgment, &c., shall not be relieved upon any such Judgment, Statute, Recognition, Specialty with Penalty, Attachment, or other Security, for any more than a rateable Part of their just and due Debts with the other Creditors of the said Bankrupt.—The Cases upon this Section are, *Sloper v. Fish*, 2 Ves. and Beames, 145. *Newland v. —* 1 P. Wms. 92. *Orlebar v. Fletcher*, *ibid.* 737. *Sugden's Law of Vendors*, 363.

1814.

SHARP  
and Others,  
Assignees,  
&c. v.  
ROANDE.

LINCOLN'S  
INN HALL,  
August,  
1814.

*Semble*, That if in a foreign Port a Loan of Money is necessary to enable the Master of a Ship to prosecute his Voyage, a Person making that Advance is entitled to a Lien on the Ship, without an Instrument of Hypothecation.

*Ex parte* HALKETT.—In the Matter of MAVOR.

THE Petitioner stated, that the Company's Ship *Canton*, being in the Month of *March* 1811, at *Canton* in *China*, and the Sum of 6000 Dollars being required for her Use, a public Notice was exhibited in the Factory at *Canton* to that Effect.

That the Petitioner, who commanded the Company's Ship *Cirencester*, being at that Time at *Canton*, agreed to advance the 6000 Dollars upon the Security of the Ship (being, as it was alleged, usual in such Cases), and of Bills drawn by the Captain upon the managing Owner.

That the Dollars were advanced, and the Bills given accordingly.

That the Bills were drawn by the Captain, as Captain, and on Account of the Ship, and that the Dollars were applied solely for the Purposes of the Ship.

That it is usual in such Cases, and was expressly understood and agreed between the Petitioner and the Captain, that the Dollars were advanced upon the Credit of the Ship, as well as the Bills; and that the Ship, the Captain, and the Owners, were to be jointly and severally liable for the same.

That the Bills were duly accepted; but before they became due, the managing Owner became Bankrupt.

That the Assignees had taken Possession of the Ship on her Arrival in this Country, and sold it, and received the Produce.

The

The Petition therefore prayed, that the Assignees might be directed to pay the Amount of the Bills, with Interest, out of the Proceeds of the Ship.

There were Affidavits of the Captain and the Purser of the *Canton*, verifying the Statements of the Petition, and stating, that unless the Sum had been advanced, the Ship could not have proceeded on her Voyage.

There was also the Affidavit of the Petitioner, stating Notice to the Assignees.

Mr. *Hart* and Mr. *Seton*, for the Petitioner, cited *Hussie v. Christie*, 13 *Ves.* 599, where it is said, that for Repairs done to a Vessel abroad (and consequently it was argued for Necessaries), the Creditor may acquire a Lien on the Ship without any Instrument of Hypothecation.

Sir *Samuel Romilly* for the Assignees.

*The Lord CHANCELLOR.*

The Case cited was in the Instance of a Master of a Ship, who was entitled to a Lien without an Instrument of Hypothecation. The Allegation in the Petition, that the Ship could not have prosecuted her Voyage without the Advance of the 6000 Dollars, is a most material Circumstance in Favour of the Application. You may take an Enquiry whether the Whole or any Part was expended in Repairs or Necessaries (a).

(a) *Vide Post.* 229  
19 *Ver.* 473.

1814.

*Ex parte*  
**HALKETT.**  
—In the  
Matter of  
**MAVOR.**



IN CHANCERY.

1815.

Easter Term.

WALL v. ATKINSON.

An Order of the Court of Chancery for Payment of a Sum of Money may be proved under the Commission, and will be barred by the Certificate. A certificated Bankrupt, therefore, ordered to be discharged out of Custody, upon an Attachment for Disobedience of such an Order. The Act of the Court is an Indemnity to the Gaoler.

**L**ANGSTAFF, a Defendant in this Suit, had been attached for a Contempt, in not having paid a Sum of £500 pursuant to an Order. He had been turned over to the *King's Bench*, and was in the Custody of the Marshal. The Order had been made and the Attachment executed previously to his Bankruptcy. He had obtained his Certificate.

Sir *Samuel Romilly* and Mr. *Cullen*, moved that he might therefore be discharged out of Custody. *Ex parte Parker*, 3 *Ves. Jun.* 554, *Baker's Case*, 2d *Strange*, 1152.

Mr. *Bell*, for the Parties interested in the £500, opposed the Motion. This was not strictly a Debt; it could not be made the Subject of an Action: it originated in, and was entirely a Creature of a Court of Equity. The Seventh Section of the 5 *Geo. II.* speaks only of legal Debts.

*The Lord CHANCELLOR.*

The Section of the Statute referred to by Mr. *Bell* is certainly, in the Terms of it, limited to legal Debts; and the more enlarged Language of the Insolvent Acts affords perhaps an Argument against this Application. But an Order of this Court for Payment of Money has been held to be a Debt proveable in Bankruptcy; and as a Debt proveable, will be barred by the Certificate. If the Debt is discharged, it is idle to retain the Process, which, though founded upon a Contempt of this Court, is in Substance but to enforce the Payment of a Debt, and

the interference of this Court against its own Order will be protective of the Gaoler.

1815.

WALL

v.

ATKINSON.

Declare that the Certificate has discharged the Demand, and therefore let *Langstaff* be released out of Custody, as to the Contempt in this Cause.

In the Matter of M<sup>WILLIAMS</sup>, Cause of issuing it. Every Mode  
1 *Scho. and Lefroy*, 174. by which a Creditor can arrest a  
Lord *Redesdale*, C. says, the Bankrupt for a Debt comes within  
Thing to be considered is, not the the Meaning of the Act (a).  
Form of the Process, but the

(a) *Irish Statute of 11th and 12th Geo. III. c. 8. s. 23.*

*Ex parte* the ROYAL BANK of SCOTLAND.—In  
the Matter of STEIN and Others.

LINCOLN'S

INN HALL,

Feb. 1815.

THE Governor and Company of the Bank of Scot- A Creditor  
land had in the Month of *May*, 1812, and in the by Bill or Note  
Course of the Months of *June* and *July* following, dis- may prove  
counted certain Bills for different Sums of Money to the against all the  
Amount in the Whole of £58,000. drawn by *Scott, Smith*, Parties to his  
*Stein*, and Co., on *Kensington* and Co., Bankers' in Lon- Security. But  
don, and severally payable sixty-five Days after Date. if previously  
to his Proof

against *A*. Dividends have been declared upon his Proof against *B*.  
or *C*, &c. such Dividend must be deducted from his Proof against  
*A*. Nor does it vary this Rule, that the Creditor not being then pre-  
pared to substantiate his Proof against *A*. had been permitted to en-  
ter a Claim against his Estate previously to the Declaration of the Di-  
vidend under the other Commissions, and had also, previously to  
such Declaration, made an Affidavit of his Debt, to be laid before  
*A*'s Commissioners at their next Meeting.

The

1815.

*Ex parte*The ROYAL  
BANK of  
SCOTLAND.—In the  
Mutter of  
STEIN and  
Others.

The Bills were particularized in the Petition, and are stated in the Note (a).

On the 22d of *July*, 1812, a Commission of Bankrupt issued against the Members of the Firm of *Kensington* and Co.

At a Meeting held under that Commission, the Petitioner, as the Cashier and Agent of the Royal Bank of *Scotland*, applied and was permitted to prove the Sum of £40,000 in respect of seven of the Bills accepted by *Kensington* and Co., amounting to that Sum (b).

(a) " One Bill dated the " Day of *July*, 1812, for the " 18th Day of *May* 1812, " like Sum of £6000; an- " for the Sum of £5000; an- " other Bill dated the 13th of " other Bill dated the 25th " the said Month of *July*, for " Day of the said Month of " the Sum of £5000; an- " *May*, for the Sum of £6000; " other Bill dated the 20th " another Bill dated the 1st " Day of the said Month of " Day of *June*, 1812, for the " *July*, for the Sum of £6000, " like Sum of £6000; an- " and all such several Bills, " other Bill dated the 8th Day " save the last mentioned " of the said Month of *June*, " Bill for £6000, were duly " for the like Sum of £6000; " accepted by the said *Ken-* " another Bill dated the 15th " *sington* and Co. " Day of the said Month of (b) " That is to say, the " *June*, for the like Sum of " Bill of the 18th of *May*, " £6000; another Bill dated " 1812, for £5000, those of " the 22d Day of the said " the 25th of *May*, the 15th " Month of *June*, for the like " of *June*, 22d of *June*, 29th " Sum of £6000; another " of *June*, and 6th of *July*, " Bill dated the 29th Day of " 1812, for £6000 each, and " the said Month of *June*, " the Bill of the 13th Day of " for the like Sum of £6000; " *July*, 1812, for £5000." " another Bill dated the 6th

The

The Petitioner did not upon that Occasion prove upon the remaining Bills, because two of them, that is to say, one of the 1st and 8th of *June*, 1812, for £6000 each, were not at that Moment in his Hands, but lay protested in the Hands of the Bank of *England*; and the third, that is to say, that of the 20th of *July*, 1812, for £6000, had not been accepted by *Kensington* and Co.

On the 11th of *August*, 1812, a Commission issued against the House of *Scott, Smith, Stein*, and Co.

At a Meeting held under the last mentioned Commission, on the 9th of *January* last, the Petitioners not being then prepared with an Affidavit of the Debt, a Claim only was admitted for the Sum of £58,000, the Amount of the Whole of the aforesaid Bills, but no Dividend was declared or made at such Meeting, and the Meeting was adjourned to a future Day.

On the 6th of *February* following, the Petitioner made an Affidavit in the Matter of the before mentioned Debt, and transmitted it to be laid before the Commissioners at their then next Meeting.

On the 13th of *February* a Dividend of Six Shillings the Pound was declared under the Commission against *Kensington* and Co., and without the Knowledge of the Petitioners, such Dividend on the Amount of the Proof made on their Behalf under that Commission was received by their Agent in *London*.

A Meeting under the Commission against *Scott, Smith, Stein*, and Co. being held on the 27th *March*, the Affidavit of Debt was tendered to be received as a Proof under the said Commission; but the Assignees insisted that the Affidavit should be admitted as a Proof only for the Residue

1812.  
  
*Ex parte*  
 The ROYAL  
 BANK of  
 SCOTLAND.  
 —In the  
 Matter of  
 STEIN and  
 Others.

1815.  
*Ex parte*  
 THE ROYAL  
 BANK of  
 SCOTLAND.  
 —In the  
 Matter of  
 STEIN and  
 Others.

sidue of such Debt, after deducting the Sum of £12,000, the Amount of the Dividend received by the Agent in London, of the Royal Bank, under the Commission against *Kensington* and Co. The Petitioners, however, would not consent to such Deduction, and their Proof was refused.

The Petitioners upon their present Application contended, that having made their Claim of Debt under this Commission before any Dividend was declared under the Commission against *Kensington* and Co. and having also made the Affidavit of Debt before the Dividend made under the Commission against *Kensington* and Co. was declared, their Proof ought to be received as the Debt stood in Point of Amount at the Times of making the Claim and Affidavit.

They therefore prayed that the Affidavit of Debt might be received as a Proof of the Whole of the Debt of £58,000.

Sir *Arthur Piggott*, and Mr. *Cullen*, in Support of the Petition.

Sir *Samuel Romilly*, and Mr. *Montague*, opposed it.

*The Lord CHANCELLOR.*

The Question is, Whether there be sufficient in the Circumstances of this Case to justify the Court in departing from the long-established Course in Bankruptcy, which says, that although you may prove against every Party to a Bill, yet if previously to the Proof any Part of the Bill has been received, there can be Proof but for the Residue only (a). The Case is so hard upon the Bank of

(a) See the Cases collected in *Cooke*, B. L. 167.

*Scotland*

*Scotland*, that I have struggled to let in the Proof: but upon an anxious Consideration of all the Cases upon this Subject, I do not find one in which the Rule I have stated has ever been departed from, except in the Cases in the Matter of *Gibson and Johnson (a)*, and indeed the very Principle of that Exception is in Favour of the general Rule. In that Case the Commissioners rejected the Proof of certain Bills of Exchange, upon the Ground that they were payable to fictitious Payees; but rejecting the Proof, they admitted the Claim. The Point was much discussed in the Courts of Law; and at Length carried to the House of Lords, where it was held, that a Bill made payable to a fictitious Payee must be considered as payable to Bearer (*b*). During the Whole of this Discussion

1814.

*Ex parte*  
The ROYAL  
BANK of  
SCOTLAND.  
—In the  
Matter of  
STEIN and  
Others.

(a) The Order Book of the Secretary of Bankrupts, August, 1794.

(b) Almost all the modern Cases upon this Question arose out of the Bankruptcy of *Livesay and Co.*, and *Gibson and Co.*, who negotiated Bills to the Amount of nearly a Million a Year. The first Case was *Tatlock v. Harris*, 3 Term Rep. 174, in which the Court of K. B. held, that the *bond fide* Holder for a valuable Consideration of a Bill payable to a fictitious Person, and indorsed in that Name by the Drawer, might recover the Amount of it in an Action against the Acceptor, for Money paid or Money had and received; upon the Idea, that there was an appropriation of so much Money to be paid to the Person who should become the Holder of the Bill. In *Vere v. Lewis*, 3 Term Rep. 182, decided the same Day, the Court held, there was no Occasion to prove, that the Defendant had received any Value for the Bill, as the mere Circumstance of his Acceptance was sufficient Evidence of this: and three of the Judges thought the Plaintiff might recover on

a Count, which stated that the Bill was drawn payable to Bearer. *Minet v. Gibson*, 3 Term Rep. 481, put this Point directly in Issue, and the unanimous Opinion of the Court was, that where the Circumstance of the Payee being a fictitious Person is known to the Acceptor, the Bill is in Effect payable to Bearer. Soon after, the Court of C. P. laid down the same Doctrine in *Collis v. Emet*, 1 Hen. Bla. 313. This Decision was acquiesced in; but *Minet v. Gibson* was carried up to the House of Lords, 1 Hen. Bla. 569. The Opinions of the Judges being taken, *Eyre, C. B.* (p. 598), and *Heath, J.* (p. 619), were for reversing the Judgment of the Court below, and Lord *Thurlow, C.* coincided with them (p. 625); but the other Judges thinking otherwise, Judgment was affirmed. Parl. Cas. 8vo. ii. 48. The last Case upon the Subject is *Gibson v. Hunter*, 2 Hen. Bla. 287, 188, which came before the House of Peers upon a Demurrer to Evidence: and in which it was held, that in an Action on a Bill of this Sort against the Acceptor, to shew that he was aware of the Payee being fictitious.

1815.

*Ex parte*  
The ROYAL  
BANK of  
SCOTLAND.  
—In the  
Matter of  
STEIN and  
Others.

sion the Claim remained upon the Proceedings, and between that and the final Decision, Payments had been made upon some of the Bills. When therefore the Commissioners resolved to admit the Proof, the Question arose whether or not it should be made subject to the Deduction of those Payments. In the Result it was held, that although generally all the Payments made previously to the Proof must be deducted; yet in this Case the Proof would relate back to the Time of the Claim, at which Time the subsequent Decisions had in the Nature of an Appeal shewn that it ought to have been received: and in that View of the Case, the Sums partially paid were to be considered as Payments subsequent to the Proof. The very Distinction in that Case establishes the general Rule. It is a great Hardship on the Bank of Scotland. I give this Decision reluctantly, and shall willingly listen to their Application to rehear it.

tious, Evidence is admissible of the Circumstances under which he had accepted other Bills payable to fictitious Persons. *Vide also Tufi's Case. Leach Cro. Law, 206.*

In *Bennett v. Farnell*, it was ruled that a Bill of Exchange made payable to a fictitious Person, or his Order, is void, unless it can be shewn that the Circum-

stance of the Payee being a fictitious Person was known to the Acceptor; but if Money paid by the Holder of such a Bill, as the Consideration for its being indorsed to him, gets into the Hands of the Acceptor, it may be recovered back as Money had and received. *Vide 1 Camp. Nisi Prius Cases, 130, 180, and Chitty on Bills, 79.*

*Ex parte Todd*, in the Matter of *Watson, Linc. Inn Hall, August, 1815*, raised the same Point with a similar Result. In that Case the Dividends sought to be deducted from the Proof tendered had been declared, but had not been paid to the Bill Holder.

The Lord CHANCELLOR.

That Circumstance cannot vary the Rule: the Dividend was in Effect the Money of the Petitioner in the Hands of the Assignees; and as he might have received it antecedently to his Proof, the Deduction must be made.

*Ex*

*Ex parte* HARCOURT.

LINCOLN'S  
INN HALL,  
July 19,  
1815.

THE Petitioner was a Member of the Commons House of Parliament, and a Banker at Chard in Somersetshire. He had been declared a Bankrupt under the 4th Geo. III. c. 33. (a), and now applied to supersede the Commission upon two Grounds.—1st, That he had not been duly found and declared a Bankrupt within the true Intent and Meaning of that Statute.—2d, That at the Time of the Docket being struck, an Arrangement was pending for the Settlement of the Claims between

The Act of Bankruptcy created by 4 Geo. III. c. 33. must in some of its Circumstances be proved by a Creditor; a Cre-

ditor therefore admitted to prove them: but as the Necessity alone justifies this Exception from the Rule, his Testimony cannot be received as to Facts, of which Evidence can be obtained from other Sources.

When a Person, as of a given Character, and under certain Circumstances, is brought within the Bankrupt Laws, the Adjudication of the Commissioners ought to proceed upon direct Evidence before them that the Person is of the Character and within the Circumstances required: and not upon a Deposition incorporating the Substance of an Affidavit, in which (in another Court) those Essentials have been attested.

*Semble*, it ought to appear upon the Deposition, as an Ingredient of the Act of Bankruptcy under 4 Geo. III. c. 33, that the Summons required to be served on the Trader M. P. was taken out after the Affidavit was filed of Record.

Though the Requisition for sustaining a Commission have been complied with, and the Commission be legally valid, yet if it has been taken out against good Faith, and with a View to enforce a Compliance with an Arrangement then pending between the Parties, this Court will supersede it upon the general Principle which all Courts apply in controlling the Abuse of their Process.

The Commission of Bankruptcy introduced by 4 Geo. III. c. 33. is within that general Principle.

(a) See the Clause of the Statute stated in the Judgment of the Court.

him



1815.  
 Ex parte  
 HARCOURT.

him and the petitioning Creditors; and that the Commission was taken out in Order to force the Petitioner to accede to Terms which ought not in Justice to have been exacted of him.

The Act of Bankruptcy upon the Proceedings was as follows :

*Thomas Pyke*, (one of the petitioning Creditors) proved, that he, by Virtue of the Act of 4 Geo. III. for preventing Inconveniences arising in Cases of Merchants, and such other Persons, as are within the Description of the Statutes relating to Bankrupts, being entitled to the Privilege of Parliament, and becoming insolvent, did, on or about the 14th of *March* last, make an Affidavit in the *King's Bench*, that said Bankrupt was justly indebted to him in £1418:10s., and that said Bankrupt was a Trader within the Description of the Statutes relating to Bankrupts, and that said Bankrupt had not paid, secured, or compounded said Debt, or entered into any Bond to pay such Sum as should be recovered in the Action.

*Ellis Clowes* proved that he, on the 3d of *April* following, filed, in the *King's Bench*, the aforesaid Affidavit, and sued out a Summons against the Bankrupt.

*George Green* proved the Service of Summons on same Day.

The Affidavit and the Summons were as follows :

Affidavit.

In the *King's Bench*—*Thomas Pyke*, of *Bridgewater*, in the County of *Somerset*, Gentleman, maketh Oath and saith, that *John Harcourt* is justly and truly indebted unto him, this Deponent, in the Sum of One Thousand Four Hundred and Eighteen Pounds, and Ten Shillings, upon,

upon, or by Virtue of, a Judgment, recovered by him this Deponent, in this Honourable Court in *Easter Term* last, against the said *John Harcourt*, for the Sum of Five Thousand One Hundred and Twenty-four Pounds, Four Shillings, and Seven Pence. And this Deponent further saith, that the said *John Harcourt* now is, (as this Deponent verily believes) a Banker, within the Description of the Statutes relating to Bankers (*a*), and having Privilege of Parliament as one of the Members of the Honourable House of Commons.—*T. Pyke*.—Sworn at *Chard* in the County of *Somerset*, by the above-named *Thomas Pyke*, the Fourteenth Day of *March*, One Thousand Eight Hundred and Fifteen, before me *Thomas E. Clarke*, a Commissioner, &c.—The above is a true Copy, examined with the Original, this seventh Day of *July*, 1815. *R. Robinson*, Assistant Clerk of the Declarations.

1815.  
Ex parte  
HARCOURT.

*George* the Third, by the Grace of God, of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith. To the Sheriff of *Middlesex*, greeting: We command you that you cause to be summoned *John Harcourt*, Esq., having Privilege of Parliament, that he be before us at *Westminster*, on *Wednesday* next, after fifteen Days of *Easter*, to answer *Thomas Pyke*, of a Plea of Debt for Ten Thousand One Hundred and Twenty-four Pounds, Four Shillings, and Seven Pence, as he shall be able reasonably to shew that thereof he ought to answer, and have there then this Writ.—Witness *Edward Lord Ellenborough*, at *Westminster*, the Thirteenth Day of *February*, in the Fifty-fifth Year of our Reign.—*Law* and *Markham*.

Summons.

(*a*) In the Affidavit in the in the preceding Deposition *King's Bench*, it was *Bankers*. before the Commissioners it In embodying this Affidavit was taken as *Bankrupts*.

Sir

1815.

*Ex parte*

HARCOURT.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Montagu*, supported the Petition.

Mr. *Cooke*, and Mr. *Heald*, opposed it.

In the Course of the Argument, the Lord *Chancellor* intimated his Opinion to be against the Sufficiency of the Act of Bankruptcy, and upon these Grounds. 1st, That the Affidavit, made in the Court of *King's Bench*, was irregular, in not containing a precise Averment, that the Bankrupt had Privilege of Parliament.—2nd, That there was no Evidence of that Circumstance before the Commissioners.—3rd, That it did not appear that the Summons was served after the Affidavit was filed. And lastly, that the Act of Bankruptcy depended upon the Evidence of a Creditor who was incompetent to prove it (*a*).

To these Objections it was answered, that the grammatical and unstrained Construction of the Affidavit spoke to *Harcourt's* having Privilege of Parliament, and that the Commissioners in taking the Deposition had adopted the Affidavit; not indeed the Words, but the Substance of it; and had therefore taken that Requisite as a Fact sufficiently established, without requiring more formal Evidence of it; that the Court would presume the Summons had been duly served; that this was a Case in which, from Necessity, the Creditor must prove some Circumstances of which this particular Act of Bankruptcy is constituted, viz. that he had not been paid or compounded with, &c., and being from Necessity admitted to prove some, he might from Convenience depose to the Rest.

(*a*) *Malkin v. Adams*, ante, 32. *Ex parte Osborn*, 1 Vol. 887, 892.

. The Petition stood over.

1815.

*Ex parte*  
HARCOURT.

*The Lord* CHANCELLOR.

I yesterday suspended my Judgment on this Petition, because in the Course of the Argument Difficulties had occurred to me, which, both from the Novelty and Importance of this Case, I was anxious to reconsider. This is a Bankruptcy proceeding upon the Statute 4th *Geo.* III. c. 99, entitled an Act "for preventing Inconvenience arising in Case of Merchants, and such other Persons as are within the Description of the Statutes relating to Bankrupts, being entitled to Privilege of Parliament, and becoming insolvent."

Prior to the 12th and 13th of *Will.* III. c. 3. (a), a Member of Parliament was not subject to be sued by a *Capias*, but only by an original Writ; that Statute, entitled an Act for preventing any Inconveniences that may happen by Privilege of Parliament, provides "that if any Person or Persons having Cause of Action or Complaint against any Peer of this Realm, or Lord of Parliament, such Person or Persons after any Dissolution, Prorogation, or Adjournment, as aforesaid, or before any Session of Parliament, or Meeting of both Houses as aforesaid, shall and may have such Process out of His Majesty's Court of *King's Bench*, *Common Pleas*, and *Exchequer*, against such Peer or Lord of Parliament, as he or they might have had against him out of the Time of Privilege: and if any Person or Persons having Cause of Action against any of the said Knights, Citizens, or Burgesses, or any other Person intitled to Privilege of Parliament, after any Dissolution, Prorogation, or such Adjournment as aforesaid, or before any Session of Parliament, or Meeting of both Houses as aforesaid, such Person or Persons

(a) Amended by 11 *Geo.* II. c. 24.

shall

1815.

*Ex parte*  
HARCOURT.

shall and may prosecute such Knight, Citizen, or Burgess, or other Person entitled to the Privilege of Parliament in His Majesty's Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, by Summons and Distress infinite, or by original Bill and Summons, Attachment and Distress infinite, thereupon to be issued out of any of the said Courts of Record, which the said respective Courts are hereby impowered to issue against them, or any of them, until he or they shall enter a common Appearance, or file common Bail to the Plaintiff's Action, according to the Course of each respective Court."

I have stated the Enactment, because its Construction may throw some Light upon the Language of this. That Statute, like the one upon which the present Question arises, points out the same Mode of Process; Summons, or original Bill and Summons; and the Practice which has regulated the Nature of the Process since that Statute affords much Explanation as to the Nature of the Summons which the Legislature intended should be adopted in this. The Section of the Statute, upon which the Validity of this Commission depends, is as follows. "Whereas Merchants, Bankers, Brokers, Factors, Scriveners, and Traders, *within the Description of the Statutes relating to Bankrupts*, having Privilege of Parliament, are not compellable to pay their just Debts, or to become Bankrupts, by Reason of the Freedom of their Persons from Arrests upon Civil Process: and some Doubts have also arisen, whether in Cases of Bankruptcy a Commission can be sued out during the Continuance of such Privilege; to remedy which Inconveniences, and to support the Honour and Dignity of Parliament, and good Faith and Credit in commercial Dealings, which require that in such Cases the Laws should have their due Course; and that no *such* Merchants, Bankers, Brokers, Factors, Scriveners, or Traders, in Cases of actual Insolvency, should, by any Privilege

Privilege whatever, be exempted from doing equal Justice to all their Creditors: Be it enacted, That from and after the eleventh Day of *May*, One thousand Seven Hundred and Sixty-four, it shall be lawful for any single Creditor, or two or more Creditors being Partners, whose Debt or Debts shall amount to One Hundred Pounds or upwards, and for any two Creditors whose Debts shall amount to One Hundred and fifty Pounds or upwards, or any three or more Creditors whose Debts shall amount to Two Hundred Pounds or upwards, of any Person or Persons deemed a Merchant, Banker, Broker, Factor, Scrivener, or Trader or Traders, *within the Description of the Acts of Parliament relating to Bankrupts having Privilege of Parliament,*" (it is to be observed that this Qualification closes in every Instance the Description of the Persons to be brought within the Act), "at any Time upon Affidavit or Affidavits being made and filed on Record in any of His Majesty's Courts at *Westminster*, by such Creditor or Creditors, that such Debt or Debts is or are justly due to him or them respectively; and that every such Debtor as he or they verily believe is a Merchant, Banker, Broker, Factor, Scrivener, or Trader, within the Description of the Statutes relating to Bankrupts, to sue out of the same Court Summons, or an original Bill and Summons," (and which are the Modes of Process pointed out by the Statute of *William*), "against *such* Merchant, Banker, Broker, Factor, Scrivener, or Trader, and serve him with a Copy thereof." (Upon which perhaps a Question might arise, whether "Copy thereof" means Copy both of the Affidavit and the Summons, although I think it is to be understood only as requiring a Copy of the Summons;) "and if such Merchant, Banker, Broker, Factor, Scrivener, or Trader, shall not within Two Months after personal Service of such Summons, Affidavits of the Debt or Debts having been duly made and filed as aforesaid, pay secure or compound for such Debt or Debts *to the Satis-*

1815.

*Ex parte*

HARCOURT.

1815.

*Ex parte*

HARCOURT.

*faction of such Creditor or Creditors, or enter into a Bond in such Sum, and with two such sufficient Sureties, as any of the Judges of that Court out of which such Summons shall issue shall approve of, to pay such Sum as shall be recovered in such Action or Actions, together with such Costs as shall be given in the same, he shall be accounted and adjudged a Bankrupt from the Time of the Service of such Summons; and any Creditor or Creditors may sue out a Commission against any such Person, and proceed thereon in like Manner as against other Bankrupts."*

With these Observations I proceed to the Consideration of the Proof of the Act of Bankruptcy. It has been contended, that the Act of Bankruptcy has been well proved, because this Court will presume that every Thing which was done in the *King's Bench* was regularly and rightly done, and that Mr. *Harcourt* has been already there proved to have been a Person having Privilege of Parliament, and a Trader. I have very great Difficulty in adopting that Presumption. Where a Statute says, that a Person of a given Character shall be under certain Circumstances a Bankrupt, upon what Ground can the Adjudication of his Bankruptcy by those commissioned to pronounce that Adjudication be supported, but upon Proof before them, that he sustains the Character, and is within the Circumstances required? And where Part of those requisite Circumstances is the not having done certain specified Acts, his Default in the Acts required must be proved. With Reference then to this, how does the Commission stand? Upon the Evidence of a Person incompetent to prove an Act of Bankruptcy; and who, if he could be admitted for that Purpose, has spoken to a most material Ingredient in it, not upon the Deposition before the Commissioners, but in another Court, and for another immediate Purpose.

It

It has indeed been argued, that the Act of Bankruptcy introduced by this Statute, must of necessity be proved by a Creditor, because it is constituted of Circumstances which rest, and can rest only, on his particular Testimony. The Creditor can alone prove that the Debt has not been paid, secured, or compounded for, to his Satisfaction. The Evidence of those Negatives is not involved in the Proof of his Debt, because the Debtor might have complied with some of the Requisites, for Example, the giving of the Security; and still have left in the Creditor a Debt that might be sworn to under a Commission. I certainly concede, that with Reference to the negative Circumstances which the Statute requires, the Evidence of a Creditor must, in this particular Act of Bankruptcy, be admitted to that Extent; but the Necessity which exacts this Admission limits the Extent of it; and although you must admit him to prove what he alone can prove, yet he is not to be admitted to prove what can be established by the Evidence of others. The Circumstance, for Example, of Mr. *Harcourt's* being a Member of Parliament, and a Banker, could have been derived from other Sources, and ought not to have been left to depend upon the Statement of the Creditor—upon his Statement, too, made in another Court, and for another Purpose.

1815.  
*Et parte*  
 HARCOURT.

The Deposition then proceeds to state what is not the Fact, viz. that the petitioning Creditor had made an Affidavit that Mr. *Harcourt* was a Trader within the true Intent of the Statutes relating to *Bankrupts*. It has been contended, that as the Affidavit speaks in Terms to his being a Banker, and, as such, notoriously within the true Intent of those Statutes, a general Allegation to that Effect would in this Instance be a Surplusage; and that an Inaccuracy in it is therefore immaterial. It is unnecessary to say whether this Distinction is right: but if it were neces-



1815.  
*Ex parte*  
 HARCOURT.

sary in the Deposition to follow the Affidavit, it ought, in adopting this Affidavit, to have stated it correctly. It is but Justice to the Commissioners to say, that in the Deposition to this Act of Bankruptcy, they have followed the printed Precedents which are to be found in Works of the greatest Respectability; I think, inaccurate in this Respect, that in giving this Affidavit they have considered it to be sufficient to state *Pyke's* Representation of the Substance of it; the constructive Matter of the Affidavit, and not the Affidavit itself; and the Deposition, perhaps, ought to have pointed out, that the Summons was taken out after the Affidavit was filed of Record. I will presume that it was so.

I desire to be understood as disavowing any judicial Inclination to narrow the Remedy which this Act of Parliament has provided; it is a most salutary Act: but with every Inclination to give Effect to it, I have no Authority to say that a Member of Parliament can be brought within its Operation, unless there be a complete and established Concurrence of all the Circumstances which the Act of Parliament requires. And further, although the Circumstances should concur, and although a Commission has issued upon this Act of Bankruptcy, yet if there be Grounds to interfere, the Court will not hesitate to supersede a Commission so awarded, as readily as it would supersede a Commission proceeding upon any other Act of Bankruptcy. Upon general Principles, and although the Statute contains no Provision to that Effect, the Jurisdiction is undoubted. Regarding the Commission as a Species of Execution, this Court would relieve against an Abuse of it, upon the same Principle that all Courts of Justice regulate their Process. With this Observation, I proceed to consider the second Objection to this Commission.

*It*

It is here an important Circumstance that this is not the Commission of any third Person, grounded upon the Act of Bankruptcy originating with Mr. *Pyke*, but the Commission of Mr. *Pyke* himself, whose Conduct, more particularly with Reference to the Arrangement or Treaty pending between the Parties at the Time when this Commission was sued out, will to a very great Extent regulate the Court in disposing of it. It is competent to some Creditors to proceed upon an Act of Bankruptcy, which to other Creditors would not be open. It is now clearly established Law, and I well remember the earliest Case upon this Subject, that he who is a Party to the Deed of Assignment by a Trader of all his Effects, is precluded, by the Circumstance of his being implicated in the Transaction, from proceeding upon it as an Act of Bankruptcy (a): and yet it would be difficult to derive from any Thing in the Statute (b) which contemplates this as a fraudulent Assignment, and as an Act of Bankruptcy, an Authority for that Exclusion. Upon equitable Principles, the Decision in that Case has been carried to this Extent, that even if the Creditor had not executed the Deed, yet if he had held himself out as willing to execute it, or from Circumstances of Conduct could be considered as having acceded to it, that would be considered as in Substance making himself a Party to it, and thereby estopping him from resorting to it as an Act of Bankruptcy. With these Circumstances of Conduct however, the Commissioners had nothing to do: their Duty was different from mine; and although the Circumstances of Conduct might perhaps have authorised an Application to me, against the Sealing of this Commission at the Instance of a Creditor so implicated, it being once sealed, the Com-

1815.

*Ex parte*  
HARCOURT.

(a) *Bamford v. Baron*, 2 *rison*, Vol. I. 215.  
T. R. 594. *Dutton v. Mor-* (b) 1 *Jac.* 1. c. 15. s. 2.

1815.

*Ex parte*

HARCOURT.

missioners had only to proceed in it. Considering, therefore, all the Affidavits in this Case to have been complete and accurate: looking merely at the Circumstances of Conduct and good Faith which ought to have been observed, pending the Negotiations between these Parties, there is enough, upon the Principle of Control over the Abuse of their Proceedings which all Courts entertain, to say that this Commission ought not to stand. It was not mere Courtesy, but good Faith and fair Dealing, that required of these Parties, previously to their resorting to a Commission, a Notice from them to the Person who was to be the Object of it, that all Negotiation and Compromise was to be at an End. I think that in the Letter of the 9th of June, alone (a), there is sufficient to strike at the Root of this Commission; a Commission, taken out, not for its legitimate Operation, but to enforce their own Objects. Independently therefore of the Objection which

(a) Sir,

I presume you cannot be ignorant of the rapid Approach of that Situation which must determine all Negotiation between you and the Messrs. Pyke, and place the Settlement of your Affairs in other Hands. If it be yet possible to avert this, I shall be ready to receive any Proposal you may be disposed to make; but as my Stay in Town will be only about two Days longer, the Proposal must be made immediately; and I conceive you must be aware that it is now out of the Power of the Messrs. Pyke to accede to the Terms that they have heretofore proposed. The very serious Consequences which will arise to yourself, I shall always attribute to the mischievous advice of the Persons who have, unfortunately, such Influence over your Actions. Had you followed your own Disposition, I am satisfied you would not have committed the Folly of refusing the Terms which have

been in your Power to accept; nor do I think that, but for those, you would, from Malevolence, without a Prospect of Advantage, and indeed with a Certainty of Disadvantage to yourself, have adopted the Measures which you have some Time since pursued. As, however, you are still influenced by the same Advisers, it is the Duty of every Person with whose Affairs you are at all connected, to prevent, as far as possible, a Recurrence of vindictive and oppressive Proceedings; if, however, it be still possible to bring all Matters to an amicable Issue, I shall be ready, as I have before stated, to interfere, and forward, as much as possible, any Proposal which you may be disposed to make, whereby this can be obtained.

And am, &amp;c.

This Letter was from the Solicitor to the petitioning Creditors who the Day before had issued the Commission.

arise S

arises upon the Act of Bankruptcy, I consider this Commission, upon the latter Ground alone, to be supersedable; viz. that this Commission, looking at it as a Species of Execution of which the Court will regulate the Abuse, has in Contravention of good Faith been resorted to, pending a Negotiation whereby the Parties were thrown off their Guard, and for the illegitimate Purpose of inducing an Accession to the Demands of the Party issuing it.

1815.  
*Ex parte*  
 HARCOURT.

Let the Commission, therefore, be superseded, with Costs.

*Ex parte* STUART.—In the Matter of LEICESTER.

*The Lord* CHANCELLOR.

LINCOLN'S  
 INN HALL.  
 18th July, 1815.

**W**HERE Title Deeds cannot be delivered, Assignees must, like any other Vendor, give attested Copies of them at the Expence of the Estate; but their Covenant, for the Production of the Deeds, should be confined to the Time of their Continuance as Assignees.

LINCOLN'S  
INN HALL.  
Aug. 1814.

## BRICKWOOD v. MILLER.

Defendant permitted to withdraw Rejoinder, and rejoin *de novo*, giving Notice of his Intention to dispute the Bankruptcy; but subject to Costs.

THE Plaintiffs were the Assignees of a Bankrupt, whose Commission had issued before the Statute 49 Geo. III. c. 121.

The Defendant, by his Answer filed after the Statute, did not admit an Act of Bankruptcy, or a petitioning Creditor's Debt, but stated that "he was ignorant of and "unable to form any Belief respecting such Matters, and "craved Leave to refer the Plaintiffs to such Proof "thereof as they might be able to make." He did not otherwise dispute the Act of Bankruptcy, or the petitioning Creditor's Debt, and he had omitted to give the Plaintiffs Notice to prove them.

The Cause being at Issue; the Defendant having examined his Witnesses; the Plaintiffs having examined some of their Witnesses, but not having closed the Examination; Publication standing enlarged until the next Seal, under an Order for that Purpose obtained by the Plaintiffs; and the Cause being about eighty off in the Paper of the *Master of the Rolls*, a Motion was made for the Defendant, that he might be at Liberty to withdraw the Rejoinder and rejoin forthwith *de novo*, giving the Plaintiffs Notice of his Intention to dispute the Act of Bankruptcy and petitioning Creditor's Debt.

The Motion was supported by an Affidavit of the Defendant's Solicitor, which stated that Notice was omitted to be given through Inadvertency: that the Deponent was advised and believed it was essential to the Justice of the Case, that the Defendant should now be at Liberty to give

give the Notice.—*Berks v. Wigan*, 1 *Vez.* and *Beames* 221. and 2 Vol. 107. was relied on.

1814.  
BRICKWOOD  
vs  
MILLER.

Mr. *Lovat* supported the Motion.

Sir *Samuel Romilly* resisted it.

*The Lord* CHANCELLOR,

After looking into the Pleadings, and reading the Statute, granted the Motion: but upon the Terms of the Defendant's undertaking to pay such Costs as the Court should direct, upon any Application the Plaintiffs might subsequently make for that Purpose.

*Ex parte* CASSIDY.—In the Matter of CASSIDY.

LINCOLN'S  
INN HALL.  
March, 1815.

**CASSIDY** the Bankrupt having been committed by the Commissioners, applied for and obtained, a Writ of *Habeas Corpus*: upon the Return to the Writ, the Warrant of Commitment, after reciting the Date of the Commission, the finding of the Bankruptcy, the different Meetings to take the Examination of the Bankrupt, and A Commitment upon the following Question and Answer, held to be invalid:

*Question*.—You having stated to the Commissioners that if you were out of Prison, you could find the Persons named by you as Debtors to your Estate; and being directed by the Commissioners to communicate to your Assignee how or where such Persons could be found, and your Assignee having called upon you and seen you in the *Fleet* Prison for that Purpose, have you given him any such Information; and if not, why not?

*Answer*.—I have not; and can give no Reason why.  
that

1815.

*Ex parte*

CASSIDY.—In  
the Matter of  
CASSIDY.

that the Bankrupt not having been able to give full and satisfactory Answers to the several Questions then and there put to him by the major Part of the Commissioners touching his Estate and Effects, they had adjourned his last Examination until this Day, proceeded as follows: “ And whereas the said *Thomas Cassidy* attends us at the *Guildhall* aforesaid, on this Day, in Pursuance of the said Adjournment, in order to finish his Examination, and to make a full Disclosure and Discovery of his Estate and Effects; and being then and there duly sworn and required by us to make such Disclosure and Discovery, and we, the said Commissioners, having, before we proceeded to act under and by Virtue of the said Commission, taken the Oath appointed by an Act of Parliament, passed in the Fifth Year of the Reign of his late Majesty *George the Second*, for Commissioners of Bankrupt to take before they act as Commissioners in the Execution of the Power or Authorities given and granted by the said Act or Acts of Parliament now in Force concerning Bankrupts, did cause the following Question to be propounded to him the said *Thomas Cassidy* (that is to say), ‘ You having stated to the Commissioners heretofore, that if you were at Liberty, and out of Prison(a), you could find the several Persons named by you in your Balance Sheet, as Debtors to your Estate; and being directed by the Commissioners to communicate to your Assignee how or where such or any such Persons could be found; and *Timothy Croysdill*, the Assignee of your Estate, having called upon you and seen you in the *Fleet Prison* for that Purpose, have you given him any such Information, and if not, why not?’ To which Question, so put by us as aforesaid, the said *Thomas Cassidy* did wil-

(a) He was charged in Execution in the Prison of the *Fleet*.

fully and obstinately refuse to give any other than the following Answer: 'I have not, and can give no Reason why,' *Thomas Cassidy*. Which Answer of the said *Thomas Cassidy* not being satisfactory to us the said Commissioners; these are therefore to will, require, and authorise you safely to keep and detain, without Bail or Mainprise, the said *Thomas Cassidy*, now in your Custody, until such Time as he shall submit himself to us the said Commissioners, or the major Part of the said Commissioners, by the said Commission named and authorised, and full Answer make to our or their Satisfaction, to the Question so put to him by us as aforesaid: and for so doing this shall be your sufficient Warrant. Given under our Hands and Seals," &c.

1815.  
*Ex parte*  
**CASSIDY.**—  
 In the Mat-  
 ter of CAS-  
 SIDY.

Sir *Samuel Romilly*, and Mr. *Horne*, supported the Motion for the Bankrupt's Discharge.

Mr. *Leach* appeared for the Assignees.

*The Lord CHANCELLOR.*

The Authority which the Commissioners have thought it their Duty to exercise in this Instance is given to them by the Statute of 5 Geo. II. c. 30. s. 16 and 17. Upon this Application, two Questions present themselves: *First*, Whether the Commitment is under the Sixteenth and Seventeenth Sections of the Statute originally valid; *Secondly*, Whether, if not, it is a Case in which, in Compliance with the Exigency of the Eighteenth Section (a), I myself, as the Judge to whom the *Habeas*

(a) By s. 18. if any *Habeas* the Form of the Warrant, the *Corpus* be brought on the Court or Judge is required to Commitment, and there shall re-commit.  
 appear to be Insufficiency in

*Corpus*



1815.

*Ex parte*

CASSIDY.—

In the Mat-  
ter of CAS-  
SIDY.

*Corpus* is returned, am authorised to re-commit. It occurred to me on the opening of this Petition, that unless some antecedent Transaction had taken Place between the Bankrupt and the Commissioners, which, as if by the Consent of the Bankrupt, had substituted the Word of Mouth of the Assignees for the Word of Mouth (a) of the Commissioners, (and I can conceive a Case in which a Bankrupt may have so pledged himself to answer his Assignees,) this Commitment could in no Manner be supported; and further, if such antecedent Transaction had taken Place, and if it so appeared on the Proceedings under the Commission it should also have been apparent on the Warrant.

The Cases (b) have established, that if the Commissioners in the Course of their Examination put Questions to the Bankrupt, to which he gives a direct Answer: yet if that Answer, however direct, be unsatisfactory to the Commissioners, they may commit him: and certainly in this Case, if the Bankrupt answering to the direct Questions of the Commissioners, had said he could not, or he would not tell, they would have been authorised to commit him. The Commissioners, however, have done this. We do not ourselves examine you, but you being in Prison, (a Circumstance, however, perfectly immaterial,) we send the Assignees to you, and now ask why you have not submitted to their Examination, and answered to their Satisfaction. The Answer is obvious: you have delegated Persons incompetent to exact a Submission upon which you can commit. I admit that the Word *require* in the Eighteenth Section of the Statute makes it my Duty, in the Case there stated, to re-commit. But unless I could draw up a Warrant, embodying in it the an-

(a) 5 Geo. II. c. 30. s. 16. in the Note to *Ex parte Olive*

(b) See the Cases collected 1 Vol. 415.

tedent Questions as adopted by and proceeding from the Commissioners, I cannot effectually interpose. I think the Commissioners have been mistaken; in Substance the Commitment is inaccurate, and the Bankrupt is entitled to be discharged.

1815.

*Ex parte*  
CASSIDY.—  
In the Mat-  
ter of CAS-  
SIDY.

*Ex parte* JACKSON.—In the Matter of JACKSON.

LINCOLN'S  
INN HALL,  
June, 1815.

UPON a former Petition in this Matter praying the Removal of the then Assignees, the *Lord Chancellor* made an Order, giving Permission to the Creditors, if they should think fit, to proceed to a new Choice; under that Order the Creditors met, and elected the Bankrupt: he had obtained his Certificate.

A Bankrupt, whether certified or not, cannot be Assignee under his own Commission.

The present Petition was presented to have that Election confirmed, and the Removal of the former Assignees completed. The Question raised was, whether a Bankrupt could be Assignee under his own Commission.

Mr. *Hart* and Mr. *Bell*, on the Part of certain dissentient Creditors, contended that he could not: although the Statutes contained no direct Prohibition, their Principle implies it. The Choice of Assignees is made at the second Meeting, antecedently to the Time fixed for the Bankrupt's last Examination, or the Necessity for his Surrender. Is he to conduct his own Examination? How can the Creditors confide in the Fulness of his Disclosure? Taking him to be uncertificated, how can he, although as Assignee, bring Actions? That he has been chosen upon the Removal of others, and is not an original

1815.

*Ex parte*  
JACKSON.—  
In the Mat-  
ter of JACK-  
SON.

original Assignee,—that he is certificated, makes no Difference in Principle; which, with Reference to his Commission and his Creditors, considers him as a Criminal, and unworthy of Confidence.

Sir *Samuel Romilly*, *contra*, cited a Case in *Green's Bankrupt Law* (a), directly decisive of the Point,—and there were many analogous Instances. A Man may continue a Trustee although he has become a Bankrupt, and as such may prove Debts against his own Estate. No other Person was in this Instance proposed, and Mr. *Jackson* was elected by all the Creditors present (b). He has obtained his Certificate, and of Course has passed his last Examination.

*The Lord CHANCELLOR.*

I shall not determine how far the Case, which has been cited, ought to influence the Decision of this, until the Circumstances of it have been ascertained by a Reference to the Books in the Bankrupt Office (c); although the Cases appear to be distinguishable. This Question does not depend upon the Right of the Bankrupt individually as the Representative of his Father, resolving itself in Fact into the Right of the Bankrupt himself to choose himself Assignee, and to sign his Certificate; but solely upon the Rights of other Creditors.

|                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(a) <i>Green</i> 260. and in <i>Cooke's B. L.</i> 479. In the Case cited, a Bankrupt as the personal Representative of his Father, who was the principal Creditor under the Commission, is said to have been permitted to choose himself sole Assignee, and to sign his own Certificate.</p> | <p>(b) That Fact was not disputed.</p> <p>(c) No Trace of the Case could be found in the Books at the Bankrupt Office, probably from the Circumstances of the Petition having been dismissed.</p> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

It is true, that here the Majority of the Creditors have concurred in the Election, yet it is the daily Practice, when the Majority of Creditors choose an Assignee, who has Interests adverse to those of the Minority, for the latter to apply to this Court for his Removal; and I think it is difficult to state a higher Case of adverse Interest than that of Bankrupt and Creditor. Look at the Question upon the Ground of Inconvenience. The petitioning Creditor conducts the Proceedings up to the Choice of Assignees, and then he is discharged of his Duties, and from that Time the whole Control over the Proceedings is transferred to the Assignees; and Commissions so frequently proceed, to say the least of them, in Friendship to the Bankrupt, that if this were admitted as the Practice, we should have the Bankrupt elected Assignee continually. The Circumstance of his having obtained his Certificate will not obviate the Difficulty. Creditors often, independently of the Merit of the Bankrupt or their Confidence in him, find it necessary, for the Purposes of the Estate, and from the Necessity of his Evidence, to give him his Certificate. But if giving him his Certificate they qualify him to be Assignee, as Assignee there is an End of his Testimony.

Although the Acts of Parliament contain no Restriction, although the Question could not present itself under Circumstances more in Favour of the Propriety of such a Choice, with Reference to the Individual who has been the Object of it, yet I think the Court ought to hesitate long before it gives Effect to it: It presents itself rather as a Surprise. In making the former Order I did not anticipate such a Result; and if, under the particular Circumstances of the Case, the Propriety of it had been apparent, a special Provision for the Nomination of Mr. Jackson should have been embodied in the Order.

1815.

—

*Ex parte*

JACKSON.—

In the Mat-

ter of JACK-

SON.

*Ex*

1815.

LINCOLN'S  
INN HALL,  
Aug. 1815.

*Ex parte* RIGBY.—In the Matter of EDWARDS.

One Trustee  
cannot sign the  
Certificate for  
himself and Co-  
Trustee.

UPON this Petition against the Allowance of a Certificate, the Objection was, that *Lucas*, one of two Trustees under the Marriage Settlement of the Bankrupt, had signed the Certificate, without having been duly authorised so to do by his Co-Trustee *Jones*. The Debt had been proved by *Lucas*, and the Certificate signed by him, as *John Richard Lucas* for himself and *Jones*, Trustees under *Edwards's* Marriage Settlement. It did not appear that *Jones* was dissatisfied.

Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Parke* contended, that to render a Certificate effectual as a Release of a Debt due to Trustees, it was necessary that they all should join, or that the one executing should be duly authorised. They distinguished it from the Case of one Executor or one Partner signing for the other. Upon which Analogy,

Mr. *Hart* and Mr. *Cooke* rested the Sufficiency of the Signature, and further observed that the Commissioners by the Certificate stated that it had been signed "the several subscribing Creditors, or by some Person" "them respectively duly authorised." The Presumption therefore was, that *Lucas* stood in that Predicament.

*The Lord CHANCELLOR*

Was of Opinion, that one of several Trustees was competent to sign the Certificate for himself and his Trustees. The Clause in the Certificate was that in which the Commissioners certified as of Course, but where special Authorities were requisite, as in this Case, they

they were either filed with the Proceedings, or accompanied the Certificate.

1815.

*Ex parte*

RIGBY.—In the Matter of EDWARDS.

*Note.*—If any Person sign any, such Letter of Attorney the Bankrupt's Certificate by must be left at the Bankrupt Office. 2 Cooke, 148.

*Ex parte* IMESON.—In the Matter of SEATON.

LINCOLN'S INN HALL, July, 1814. Aug. 1815.

**P**REVIOUSLY to the Month of October 1810, John Seaton, John Fox Seaton, Robert Seaton, and Thomas Foster, carried on the Business of Bankers in Copartnership, at Pontefract in the County of York; and as such Bankers issued divers Instruments, some of which were in the Words and Figures following—" Pontefract Bank, £5 : 5s. I promise to pay to Bacon Promissory Notes, payable in Cash or Bank of England Notes, which were in the Words and Figures following—" *Pontefract Bank, £5 : 5s. I promise to pay to Bacon Promissory Notes within the Statutes of Anne. The Holder therefore, who had received them from an intermediate Person, held not entitled to prove them as a Debt against the Maker.*

And others of which were in the Words and Figures following—" I promise to pay the Bearer one Guinea on Demand here, in Cash or Bank of England Notes. For John Seaton, Sons, and Foster. Robert Seaton."

In or about the Month of October 1810, separate Commissions of Bankrupt issued against John Seaton, John Fox Seaton, Robert Seaton, and Thomas Foster, and they were all found and declared Bankrupts.

1815.

*Ex parte*  
IMESON.—  
In the Mat-  
ter of  
SEATON.


*John Beckett and George Clarke of Barnsley*, in the County of *York*, Bankers, before the said Bankruptcies, received divers of the said Instruments at their Bank in *Barnsley*, from their Customers and others coming to such their Bank in the usual Course of Business, and not from the said *John Seaton, John Fox Seaton, Robert Seaton*, and *Thomas Foster*, or any of them; and they proved a Debt of £374 : 17s. under the several Commissions, as a Debt due to them from the said *John Seaton, John Fox Seaton, Robert Seaton*, and *Thomas Foster*, upon thirty-eight of the said Instruments, in their several Depositions called Promissory Notes for the Sum of five Guineas each, and upon one hundred and sixty-seven of the said Instruments, therein called Promissory Notes for the Sum of one Guinea each.

*Thomas Imeson*, a Creditor of the Bankrupts, by this Petition prayed that the Proof of the said Sum of £374 : 17s. might be expunged, upon the Ground, that the Instruments in Question were not valid Promissory Notes, within the Statutes 3rd and 4th *Anne*, c. 9. 7th *Anne*, c. 25. s. 3. (a), inasmuch as they were not payable in Money, but in Money or Bank of *England* Notes; and that therefore the Makers of them were not indebted to the Holders, who had received them from third Persons.

In support of this Objection was cited *Harrison's Case*, *East's Crown Law*, 927, where a forged Receipt for Bank Notes was held not to be a Receipt for Money or Goods within the Statute 2 *Geo. II. c. 25.*; and also the Case of the *King v. David Wilcock*, who was tried at the *York Lent Assizes*, 1808, before Mr. Justice

(a) See *Bayley on Bills of Exchange*, 1 N. A. *Chitty* p. 334.

*Le Blanc*, for forging one of these identical Notes. The Prisoner was convicted; but this Objection having been taken, the Point was reserved for the Opinion of the Judges. He afterwards received a free Pardon, and as there were no Circumstances in his Favor, the Pardon was understood as proceeding from the Concurrence of the Judges in the Invalidity of the Conviction.—*Bos.* and *Pul.* 526. *Stuart v. The Marquis of Bute*, 11 *Ves.* 662.

1815.  
  
*Ex parte*  
 IMESON.—  
 In the Mat-  
 ter of  
 SEATON.

On the other Side it was argued that Bank of *England* Notes were, in all ordinary Transactions, considered as Money (*a*); and more particularly so, when, by the Agreement of the Parties, they were treated as such. That here the Bank, by issuing these Notes, and the Holders by receiving them, had entered into an implied Agreement so to consider them: that the Mode of Payment must be referred to the Demand, and to the Time of Payment; not to the Promise: and that therefore the Option was in the Holder, not in the Maker, to have Cash if he thought fit. And Cases were cited as to that Effect from *Vin. Abrid.* Title Election, more particularly applicable in this Case, where the fractional Parts of the Notes must be paid in Cash. That if not valid at Law, they yet might be effectual as Choses in Action assignable in Equity; or as Agreements for valuable Consideration, where, with reference to the Amount, the Stamp was unnecessary (*b*).

*The Lord CHANCELLOR*

Directed the Facts to be stated as a Case for the Opinion of the Court of *King's Bench*. The Question

(*b*) *Vide the Cases col-* and *Pul.* 78. 48 *Geo.* III.  
 lected in *Chitty*, 341. c. 149.

(*b*) *Bishop v. Young*, 2 *Bos.*



1815.

*Ex parte*

IMESON.—

In the Mat-  
ter of

SEATON.

to be, whether the said Bankrupts *John Seaton, John Fox Seaton, Robert Seaton, and Thomas Foster*, at the Time of their Bankruptcy, were indebted to the said *Joseph Beckett and George Clarke* in the Sum of £374 : 17s. as the Holders of such Instruments ?

The Question was accordingly submitted for the Opinion of the Court of *King's Bench*, upon the State of Facts already detailed ; and it was there, in *Hilary Term* last, argued by Mr. *Littledale* on the Part of Messrs. *Beckett and Clarke*, and by Mr. *Richardson* for the Petitioner. The Court certified their Opinion, that the said Bankrupts, at the Time of their Bankruptcy, were not indebted to the said *Joseph Beckett and George Clarke* in the Sum of the £374 : 17s. as the Holders of such Instruments.

Upon this Certificate the Petition was now brought on for further Directions, when the Order was made according to the Prayer of it.

Mr. *Bell*, Mr. *Richardson*, and Mr. *Barber*, for the Petitioner.

Mr. *Hart*, and Mr. *Martin*, for Messrs. *Beckett and Clarke*.

Sir *Samuel Romilly*, and Mr. *Johnson*, for the Assignees.

*Ex*

*Ex parte* HALKETT.—In the Matter of MAVOR.

LINCOLN'S  
INN HALL,  
August 10.  
1815.

**T**HIS Petition now came on again (*a*). The Accounts shewing the Application of the 6000 Dollars having been mislaid, it had become impossible to ascertain how far they had been appropriated for the Repairs, or the Necessaries of the Ship.

See the  
Marginal  
Abstract,  
*Ante*, p. 194.  
Bills of Ex-  
change drawn  
by the Master  
upon the  
Owner, in Fa-  
vor of a Per-  
son advancing  
Money for the  
Ship, and not  
purporting on  
the Face of  
them to be  
drawn for the  
Purposes of the  
Ship, are *prima*  
*facie* Evidence  
against an Hy-  
pothecation.

Mr. *Harit* and Mr. *Seton*, admitting that generally a Lien of this Nature was confined to Advances for Repairs, relied upon the Affidavits, as shewing, by the Custom of this particular Trade, a Lien for Advances in general; and further, an Agreement of the Parties. There was no Doubt that the Master could pledge the Ship as well as the Credit of the Owners, not only for Repairs but for Necessaries.

*The Lord* CHANCELLOR.

Is there any Case of parol Hypothecation?

It was admitted there was none, but it was contended, that the Bills might be considered as an Instrument of Hypothecation. That the Bills did not appear on the Face of them to have been drawn for the Purposes of the Ship, was, as appeared by one of the Affidavits, an accidental Omission: it was not disputed, that they were in Fact drawn on that Account. *Samsun v. Braginton*, 1 Ves. 443. *Abbott on Shipping*, 150.

(*a*) *Ante*, p. 194.

*The*

1815.

*The Lord CHANCELLOR.*

*Ex parte*  
 HALKETT.  
 —In the  
 Matter of  
 MAJOR.

The Bills are *primâ facie* Evidence that there was no Hypothecation.

The Petition was dismissed.

LINCOLN'S  
 INN HALL.  
 August,  
 1815.

*Ex parte* CARTWRIGHT.—In the Matter of  
 WHITEHOUSE.

*Semble*, That  
 an uncertifi-  
 cated Bank-  
 rupt can Peti-  
 tion for a Com-  
 mission, if his  
 Assignees make  
 no Claim to the  
 Debt.

**T**HIS was a Commission sued out by *Davis*, an un-  
 certificated Bankrupt, upon a Debt contracted  
 with him subsequently to his Bankruptcy. *Cartwright*  
 and certain other Creditors of *Whitehouse*, by the present  
 Petition, prayed that the Commission might be super-  
 seded, as having proceeded upon the Debt of a Person  
 incompetent thus to enforce the Satisfaction of it; and  
 that they might be at Liberty to take out another.

In Support of the Application was cited *Ex parte*  
*Goodwin* (a); that Decision, it was urged, was in Con-  
 formity with the Principle and the Practice in Bankruptcy.  
 A Creditor striking a Docket must make an Affidavit of  
 the Truth and Reality of his Debt: but by the Assignment,  
 all his Debts are the Property of his Assignees. Next

(a) *Ex parte Goodwin*. 1 “Debt due to the Testator,  
*Atk. Rep.* 100. “The Exe- “for such Debt vested in his  
 “cutor of a Bankrupt, unless “Assignees, and consequent-  
 “the Commission against his “ly the Executor not intitled  
 “Testator has been superseded “at Law, to be the petition-  
 “ed, cannot take out a Com- “ing Creditor.”  
 “mission of Bankrupt for a

he

he is to give a Bond to the great Seal; but as having no Property, of what Value is his Bond, or what Satisfaction would it be, to a Person who had been made the Object of a malicious Commission? The next Difficulty was with respect to the Proof; the Practice requires, previously to the opening of the Commission, that the petitioning Creditor should attend and make an Affidavit of his Debt (*a*); if before that Time his Assignee should claim the Debt, (for it could not be disputed that the Property, which the uncertificated Bankrupt had in the Debt, was defeasible by the Intervention of his Assignees) there was an End of the Commission; or, suffering the Commission to proceed, they might insist upon proving for the Purpose of receiving the Dividends; but every Debt, upon which a Commission could be sustained, must be a Debt to be proved by the Creditor issuing it: but when a Creditor becomes bankrupt, the Practice requires his Assignees to join in the Proof, and in signing the Certificate (*b*). None of the Cases had decided more, than that an uncertificated Bankrupt might have a qualified defeasible Property; and even the Cases which had gone to that Extent where Actions of Assumpsit for his own personal Earnings, or of Trover, giving a special Property as against a wrong Doer.

On the other Side, the Class of Cases was cited and relied on (*c*), by which it had been established that an uncertificated Bankrupt might acquire Property, and hold it against all the World, but his Assignees: acquiring Property, he must take it with all its Incidents. He

1815.

*Ex parte*  
CART-  
WRIGHT.—  
In the  
Matter of  
WHITE-  
HOUSE.

(*a*) General Order, 26th Nov. 1798. *son, Cooke, 518. Fowler v. Down, 1 Bos. and Pul. 44.*

(*b*) 2 Christ. 199. *Webb v. Fox, 7 T. R. 391.*

(*c*) *Chippendale v. Thomlin-*

may

1815.

*Es parte*

CART-

WRIGHT.—

In the Mat-

ter of

WHITE-

HOUSE.

may clearly bring an Action, and take out Execution; and what was a Commission but an Action and an Execution? It was not pretended that here the Assignees made any Claim, and that if they did, the late Case of *Coles v. Barrow* (a) had decided, that against even his Assignees, an uncertificated Bankrupt might recover a Compensation for Work and Labour, done for the Benefit of his Estate.

*The Lord CHANCELLOR.*

• I should feel considerable Difficulty in saying, after the Decisions by which an uncertificated Bankrupt has been held competent to acquire Property and to maintain Actions, that he was incompetent to sue out a Commission. With respect to the Objection to the Bond, I cannot anticipate that there will not be Property to satisfy that Demand, if Occasion should call for its Exaction. It should, however, be ascertained what the Assignees say to this Proceeding on the Part of their Bankrupt, and for that Purpose let Notice be given to them, and let the Petition in the mean Time stand over.

*Mr. Hart, and Mr. Rose, in Support of the Petition.*

*Mr. Montagu, for the petitioning Creditor.*

(a) *Post*, in the Appendix.

*Ex*

*Ex parte* COCKAYNE and OTHERS.—In the Matter of CLIFFE.

LINCOLN'S  
INN HALL.  
*Sittings after*  
*Trin. Term,*  
1815.

**T**HIS was a Petition presented by and on the Behalf of certain Creditors in *Scotland*; it alleged that *Cliffe*, being a settled and resident Trader at *Glasgow*, became indebted there to several Persons whose Names and Debts were specified in a Schedule annexed to the Petition. In Consequence of an Intimation from *Cliffe* that he should be obliged to suspend his Payments, the Petitioners proceeded to take out a Sequestration, but before it was awarded, a Commission of Bankruptcy issued against him in *England*, under the Description of “*Henry Cliffe of Glasgow in Scotland, and of the City of Carlisle in the County of Cumberland, but now residing at the Saracen's Head Snow-Hill in the City of London, Merchant, Manufacturer, Chapman, and Dealer;*” under which *Thomas Borradaile* was chosen Assignee. As such Assignee, *Borradaile* appeared and opposed the Petitioners' Application for a Sequestration; and an Interlocutor had been pronounced by the Lord Ordinary, directing Memorials to be printed and boxed: 1st, upon the Point of Domicile: 2d, upon the whole Cause.

A Certificate allowed against the Objection of Creditors in *Scotland*, that the Bankrupt was properly the Object of a Sequestration, and that the Question of Sequestration was then depending in the Court of Session.

The Petitioners were advised that pending that Discussion they ought not to resort to the Commission, and the Bankrupt had therefore obtained the Certificate of the Commissioners, which it was the Object of the Petitioners to stay.

The Petition alleged that the greater Part of the Bankrupt's real and personal Property was in *Scotland*; that he was domiciled there; and that comparatively, both  
in

1815.

*Ex parte*

COCKAYNE

and Others.

—In the

Matter of

CLIFFE.

in Number and Amount of Debt, the Interests of the *Scotch* Creditors preponderated over those of the *English* (a).

Sir *Samuel Romilly*, and Mr. *Wingfield*, supported the Petition.

Mr. *Hart*, Mr. *Cooke*, and Mr. *Whitmarsh*, *contra*.

*The Lord CHANCELLOR*

Directed the Certificate to be allowed, observing that the Law was now too well settled between a Sequestration and a Commission, to authorise the staying of a Certificate, upon the Ground of a subsequent Sequestration.

Vide the *Royal Bank of Scotland v. Cuthbert*, 1 Vol. 462—*Selkrig v. Davies*, *Ante*, 97.

(a) That the Amount of Debt would turn the Certificate was not pressed, from the Circumstance of the Petition having, as to many of the Creditors, been presented on their Behalf, and by an Agent not duly authorised.

LINCOLN'S  
INN HALL.

Aug. 1815.

*Ex parte* GALLIMORE.—In the Matter of GALLIMORE.

Although the Requisites to sustain the Commission appear on

the Proceedings to be established, yet if the Court be satisfied on Affidavit of their Insufficiency, it will supersede the Commission without an Issue.

THIS was the Petition of the Bankrupt to supersede his Commission, upon Objections sustained by his own Affidavits, to the Trading, the Act of Bankruptcy and the Debt; in all these Points, however, the Depositions upon the Proceedings were satisfactory.

The petitioning Creditor had filed no Affidavits in Answer.

1815.

*Ex parte*

GALLIMORE.—

In the Mat-  
ter of

GALLIMORE.

Mr. *Leach* and Mr. *Cooke* contended, that as all the Requisites appeared on the Face of the Proceedings to be well established, the Court could not, in Conformity with its Practice, supersede the Commission upon Affidavits, where the petitioning Creditor was, as in this Case, willing to try the Question in an Issue. They therefore pressed for an Issue.

Sir *Samuel Romilly* and Mr. *Cullen* denied the Rule to be as stated on the other Side, and that Instances had occurred to the contrary before the *Lord Chancellor*.

*The Vice-CHANCELLOR (a)*

Directed the Petition to stand over; and on a subsequent Day Mr. *Cullen* produced the following Case.

“ *Ex parte EMERY.—In the Matter of EMERY.*

LINCOLN'S  
INN HALL.

Aug. 1812.  
S. P.

“ The Bankrupt had been a Publican at *Arundel*; a Commission had issued against him, which he now petitioned to supersede on an Objection to the Trading, satisfactorily appearing upon the Depositions before the Commissioners, as a selling of Spirits and Beer out of the House (*b*). The Affidavit of the Bankrupt denied his ever having sold Spirits or Beer out of the House, except that in one Instance as a Favor, and to a

(*a*) It was understood, and Page 1 was printed previously to the present Alteration these Sittings, that Petitions in the Practice.

for Supersedeas could be (*b*) *Ex parte Magennis*, 1 heard only before the *Lord* Vol. 84.

*Chancellor.* The Note in

trifling



1815.

*Ex parte*

GALLIMORE.—

In the Mat-  
ter of

GALLIMORE.

trifling Extent, he had sold some to a Relation; and except that he had on one Occasion opened a Stall at a Fishing Party, and afterwards disposed of what remained of the Beer and Spirits to a Person residing on the Spot, to save himself the Trouble of taking it Home.

“ The Affidavits of the petitioning Creditor in Answer, endeavoured to set up a Trading as a Shoemaker; this *Emery* by a further Affidavit contradicted.

“ Sir *Samuel Romilly*, and Mr. *Wakefield*, for the Petitioner.

“ Mr. *Hart*, for the petitioning Creditor, contended that he was entitled to an Issue, which

“ *The Lord CHANCELLOR*

“ Refused; and superseded the Commission, observing, that when he was satisfied upon Affidavit, he would not send the Parties to a Jury.”

*The Vice CHANCELLOR,*

On the Authority of the above Case, refused the Issue, and superseded the Commission.

*Er*

LINCOLN'S  
INN HALL.  
*Sittings after  
Trin. Term.*

**BRYANT.**—In the Matter of **CUMMING.**

**LIAM List** having been arrested on his Return proving a Debt under this Commission, applied and obtained, on the 4th of *March*, 1814 (*a*), an Order from the *Lord Chancellor* for his Discharge, at Costs, Charges, and Expences of the Attorney who effected the Arrest, and of the Officer who had executed the Order.

Obtaining this Order, *List* had employed the present Attorney as his Solicitor, who caused the Parties to be served with it, and demanded the Payment of his Costs, which had been taxed at the Sum of £27 : 6s. : 9d. The Parties refused to comply, as they were, on the 2d of *May*, 1814, in Consideration of the Actions against him being withdrawn, and of his being released from certain Bills of Exchange, and Release of such Costs and Expences to all the Parties named in the Order. The Petition, in Addition to the Circumstances, stated that *List* was insolvent; that Notice had been previously given to the Parties not to pay the Costs to *List*, but to the Petitioner; and that the Parties named in the Order might be directed forthwith to pay to the Petitioner the Sum of £27 : 9d., and the Costs of the present Application.

*Samuel Romilly*, and *Mr. Rose*, in Support of the Petition, cited the Cases which have established that an Attorney has a Lien on the Money recovered by his Client for his Bill of Costs (*b*). That where the Defendant

*ante*, p. 24. where all the Cases are collected.  
*4th. 720. 4 T.R. 123.*  
*Fidd's Practice*, 320,

1815.  
*Ex parte*  
 BRYANT.—In  
 the Matter of  
 CUMMING.

ant paid to the Plaintiff the Debt and Costs recovered, after Notice from the Plaintiff's Attorney not to do so, he was held liable to pay again to the latter the Amount of his Lien on such Debt and Costs (*a*); nor would the Court of *King's Bench* permit the Debt and Costs in one Action to be set off against those in another, unless the Attorney's Bill be first discharged (*b*). That the Principle of these Decisions was applicable in Bankruptcy, and had indeed been adopted by the *Lord Chancellor* in *Ex parte Rhodes* (*c*).

Mr. *Leach*, and Mr. *Cullen*, *contra*, denied that the Cases which had been cited governed a Question of Costs arising in a Court of Equity or in Bankruptcy, *Taylor v. Popham* (*d*); nor indeed had they been generally recognized at Law. As to some of them, the Practice of the Court of *Common Pleas* was at Variance with, that of the *King's Bench* (*e*): that the Costs not being out of a Fund in Court, there was nothing for the Lien to attach on, nor the Solicitor to look to, but the Responsibility of his Client. The Order raised a mere personal Right on the Part of *List*, which he was competent to renounce.

#### *The Vice-CHANCELLOR.*

Although the Costs are not given out of a Fund in Court, yet the Solicitor's Claim attaches upon them, and they are properly payable to him. I see nothing in the Cases cited for the Petitioner which ought to exclude their Application in Bankruptcy; nor do I feel inclined

- |                                 |                                |
|---------------------------------|--------------------------------|
| (a) 6 T. R. 361. 1 <i>Maule</i> | (d) 15 <i>Ves.</i> 72.         |
| and <i>Selwyn</i> , 240.        | (e) See <i>Tidd's Practice</i> |
| (b) 4 T. R. 123. 6 T. R.        | Ch. of an Attorney's Lien for  |
| 456. 8 T. R. 70.                | his Costs.                     |
| (c) 15 <i>Ves.</i> 538.         |                                |

to relax a Privilege founded in Equity, and in its Result conducive to the Interest of the Sutor, and the Convenience of Justice.

1815.

*Ex parte*

BRYANT.—In the Matter of CUMMING.

*Ex parte* MARSH and OTHERS.—In the Matter of CARLILL.

LINCOLN'S INN HALL, Aug. 1815.

**B**Y a Memorandum of Agreement, bearing Date the 19th of July 1806, made between *John Carlill* (then in Partnership with *George Greenwood*) of the one Part, and *William Marsh, James Sibbald, Josias Henry Stracey, William Fauntleroy, and Montgomerie Stewart*, Bankers and Copartners, of the other Part. After reciting that *John Carlill* had deposited with *William Marsh, James Sibbald, Josias Henry Stracey, William Fauntleroy, and Montgomerie Stewart*, an Indenture of Feoffment (being a Conveyance from the Mayor and Burgesses of *Kingston-upon-Hull* to *John Carlill*, of the Freehold and Inheritance of a certain Piece of Ground therein described;) *John Carlill* testified and declared that the said Indenture was so deposited with *William Marsh, James Sibbald, Josias Henry Stracey, William Fauntleroy, and Montgomerie Stewart*, as well for the Purpose of indemnifying them against all such Acceptances as they were then under, or which they might thereafter come under, for *John Carlill*, or for *John Carlill* in Copartnership with *George Greenwood*, or for or on Account of any other Partnership wherein *John Carlill* should be concerned; and *Carlill* agreed when required by *William Marsh, James Sibbald, Josias Henry Stracey, William Fauntleroy, and Montgomerie Stewart*, to execute an effectual Mortgage for better securing them against all and every of the aforesaid Acceptances, and

A Security to a Firm continued after an Alteration in the Members of it, upon the Construction of a Letter raising an Agreement to that Effect.

1815.

*Ex parte*

MARSH and

Others.—In

the Matter of

CARLILL.

all Sums of Money, Interest, Costs, Charges, and Expences which they, or any of them, should pay or expend in Consequence thereof, or of any Matter or Thing in any wise relating thereto.

Under this Agreement, Messrs. *Marsh, Sibbald, Stracey, Fauntleroy*, and *Stuart*, continued to keep an Account with Messrs *Carlill* and *Greenwood*, and upon *Greenwood's* retiring, with *Carlill's* subsequent Partnership of *John Carlill* and Son; and to accept Bills on the Security of the Agreement and Deposit, until the Month of *May* 1814, when *Montgomerie Stewart* retired from the Partnership of *Marsh* and Co., and Mr. *Graham* being admitted as his Successor, a new Partnership was formed, consisting of the Petitioners, under the Style of Messrs. *Marsh, Sibbald, Stracey, Fauntleroy*, and *Graham*.

The new Firm of *Marsh, Sibbald, Stracey, Fauntleroy*, and *Graham*, continued to keep an Account with *John Carlill* and Son; and accepted Bills for them from Time to Time on the Faith, as the Petition alleged, of the above recited Agreement and Deposit, which they considered a running Security in their Hands. And as Evidence that *Carlill* and Son so considered it, the Petitioners relied on a Letter addressed to them by *Carlill* and Son as follows: "*Hull*, 19th September 1814. Messrs. *Marsh* and Co. Having an Object of Speculation in View, which we cannot well obtain without having more Funds at Command, than we at present possess for a few Weeks to come, and not choosing to be under any Obligation to our mercantile Friends in *London*, several of whom we know would accommodate us by accepting Bills for us; we beg Leave to say that we should feel ourselves much indebted to you if you would have the Goodness to accept our Drafts on you to the Amount of about £2000, to be drawn in different Sums, as we may find convenient, which

which Drafts you may depend upon our providing for as usual; and by the Time our Drafts become due we shall have our Funds considerably at Liberty; we shall of course not ask your Renewal of Bills. As we have now kept an Account with you for many Years, and as the Value of the Estate belonging to our John Carlill, of which you have the Title Deeds, and Robinson's Acceptances, are together of greater Value than the Amount of your Acceptances will be, including the £2000 now asked for, we doubt not you will have the Goodness to lend us the necessary Assistance, which as we have before stated will not be again asked for, and which, at this Time, would render very essential Service to yours most sincerely,—John Carlill and Son."

1815.

*Ex parte*  
MARSH and  
Others.—In  
the Matter  
of CARLILL.

Carlill and Son subsequently became Bankrupts, and at the Time of issuing the Commission were indebted to the Petitioners upon their Acceptances, under the new Firm of Marsh, Sibbald, Stracey, Fauntleroy, and Graham, in the Sum of £17735 : 11s. 8d., for which the latter contended, that the Premises comprised in the Agreement were to be considered as a Security. They therefore prayed that the Piece of Ground might be sold before the Commissioners, and that the Money which should arise from the Sale might be paid to them in Satisfaction, as far as it would extend, of the Interest and Principal of the Debt of £17735 : 11s. 8d., with Liberty to prove the Remainder under the Commission.

This Relief was resisted upon the Ground, that the Deposit was made for the Protection of Messrs. Marsh, Sibbald, Stracey, Fauntleroy, and Stewart, and that the Contract was with them, and for Advances to be made by their House, not by another Firm of Marsh, Sibbald, Stracey, Fauntleroy, and Graham: see the Cases in the

1815.  
*Ex parte*  
 MARSH and  
 Others.—In  
 the Matter  
 of CARLILL

Note (a). Against which Objection, were relied on the Letter of the 19th of *September*, 1814, and the Case of *Ex parte Kensington* (b).

Mr. *Leach*, and Mr. *Cooke*, in support of the Petition.

Sir *Samuel Romilly* and Mr. *Agar*, for the Assignees—

*The Lord CHANCELLOR.*

The Alteration in *Carlill's* Firm is provided for in *this* Agreement, which however does not contemplate any *Al*teration in that of *Marsh* and Co.; and the Question *is*, whether, after *Montgomerie Stewart* ceased to be a Partner, that which became due is chargeable on *this* Estate (c). If it had depended merely upon *Parol*, I *think*

(a) *WESTON v. BARTON.* *Girdler*, 1 New Rep. 34.  
 4 Taunt. Rep. 673. *Strange v. Lee*, 3 East. 484.

A Bond conditioned to re- *Wardens of St. Saviour's v.*  
 pay to five Persons all Sums *Bostock*, 2 New Rep. 175.  
 advanced by them, or any of *Barclay v. Lucas*, 1 T.R. 291.  
 them, in their Capacity of N. Vide also *Montagu* on  
 Bankers, will not extend to *Partnership*, 1 Vol. 109.  
 Sums advanced after the De- (b) *Ante*, 138. 2 *Va.*  
 cease of one of the five by the *Beames*, 79.

four Survivors, the four then (c) *Ex parte BROWN*—In  
 acting as Bankers. the Matter of *MARRIS*.

Lord *Arlington v. Meyrick.* *Lincoln's Inn Hall, Aug. 1815.*  
 2 Wms. *Saunders*, 411. b. Raised this Point, whether  
*Horton v. Day*, *ibid.* *Wright* a Mortgage made by *Marris*  
*v. Russel*, 3 Wilson Rep. 530. to secure Advances made to  
 2 Bl. Report, 934. *Barker v.* himself and Partners by a  
*Parker*, 1 T. R. 237. *Myers v.* Banking-House, consisting of  
*Edge*, 7 T. R. 254. *Dance v.* three Partners, could another  
 Partner,

think it would have been very difficult to have made out the Case. But there is a subsequent Writing, which it is contended, either altogether, or partially charges the Estate with the Debt contracted after the retiring of *Montgomery Stewart*. If the £2000 then asked for were advanced upon the Faith of that Letter, there can be no Doubt that the Estate would be liable to that: it remains then to consider how far that Letter would fix the other Acceptances; and with this View it is material to ascertain by whom the Acceptances had been made, that were current, (if I may so express it), at the Time his Letter was written. If, as it is stated to me, there were no Acceptances at the Time, but such as related to Transactions after *Montgomery Stewart* ceased to be a Member of that Partnership, it would be a Declaration by the Owner of this Estate, that it was a Security for those Acceptances after Mr. *Montgomery Stewart* was not a Partner; and it appears to me that it would be too great a Nicety to insist upon, that this is to be taken as a Security for the Acceptances then current, and this £2000, as if those Acceptances were Acceptances, which according to the true Intent and Meaning of the Memorandum of Agreement, were charged upon the Estate: it would be taking a Distinction rather too thin between Acceptances prior to this Letter, and Acceptances after his Letter.

Upon the Whole, the Result is, that if this Letter were written with the Knowledge or Privity of *John Carlill*, or

Partner, having been admitted into the Banking-House, as an available Security for advances by the four. It was contended, that the fourth was merely a nominal Partner, acting in the Business at a fixed Salary, and uninterested in the Profit or Loss of the Concern.

*The Lord CHANCELLOR* Gave the Parties Liberty, if they thought fit, to try the Question at Law.

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with

1815.

*Ex parte*  
MARSH and  
Others.—In  
the Matter  
of CARLILL.



1815.

*Ex parte*  
MARSH and  
Others.—In  
the Matter  
of CARLILL.

with his prior or subsequent Approbation, then I should declare that under the Effect of that Letter, and under such Circumstances as are stated in this Case, the Deposit is to be considered as a Security for the Advance referred to in the Prayer of the Petition, and that the Estate is to be disposed of accordingly; if on the other Hand it be otherwise, then further Directions must be reserved.

The Order was made to that Effect

LINCOLN'S  
INN HALL,  
Aug. 1815.

A Landlord  
being Assignee  
cannot resume  
Possession, and  
relet, but for  
the Benefit of  
the Estate.

*Ex parte* WRIGHT.—In the Matter of SHUTTLE  
WORTH.

**B**Y an Order made in this Matter, the 26th Day of August 1814, it was referred to the Commissioners to inquire and certify whether *William Fleet*, one of the Assignees, had possessed or received any and what Part of the Bankrupt's Estate and Effects. Under this Reference the Commissioners certified, that they had proceeded to make the Inquiries directed by the said Order and had examined *Fleet* upon Oath, and found that he was the Landlord of the House in which the Bankrupt lived as a Tenant from Year to Year; that his Year commenced at *Midsummer*; that he left his House, leaving his Wife and Family therein; and that *Fleet*, without having determined the Tenancy by any Notice to quit, got the Wife of the Bankrupt to leave the House, and took Possession of, and let it to a new yearly Tenant receiving from him, for such new Demise, the Sum £106 : 16s : 3d.; which Sum was received by *Fleet* after he had become Assignee of the Estate, and which I

ims to retain as his own, not carrying any Part thereof  
the Credit of the said Bankrupt's Estate.

1815.

*Ex parte*

WRIGHT.—

In the Mat-  
ter of SHUT-  
TLEWORTH.

*The Lord CHANCELLOR*

Declared that he was not entitled to retain it; that an  
signee, happening also to be Landlord, cannot resume  
session and relet, unless for the Benefit of the Cre-  
ors of the Bankrupt.

*parte* ROFFEY.—In the Matter of DEWDNEY.

LINCOLN'S  
INN HALL,  
Aug. 1815.

THIS Petition brought on for rehearing the former  
- Petitions (*a*), in one of which it had been decided  
t a Debt, upon which the Statute of Limitations had  
ched, was not proveable under a Commission of  
kruptcy; and in the other, that the Dividends paid  
n such a Debt should be refunded (*b*).

Mr. *Montague* for the Petitioner.

Sir *Arthur Piggott*, and Mr. *Newland*, *contra*.

*The Lord CHANCELLOR*

Dismissed the Petition, observing that he had many  
ditional Reasons confirmatory of his former Decision.

Vide *Christian's Bankrupt Law*, p. 220, & seq.

*a*) *Ex parte Dewdney*, 15      (*b*) *Ante*, p. 59 N.  
.479. *Ante*, p. 59. N.

*Ex*

1815.

LINCOLN'S  
INN HALL.  
Aug. 1815.

*Ex parte* NORTHWOOD.—In the Matter of  
RICHARDS.

THIS Petition was answered by the *Lord Chancellor* on the 3d of *June*. The Affidavit in support of it was sworn on the 31st of *May*; upon the opening of the Petition it was objected that the Affidavit could not under such Circumstances, be read.

*The Lord CHANCELLOR*

Ruled, that the Affidavit having been sworn before the Petition was answered, there was no Proceeding in Court to which it could attach; and that the Objection must be allowed.

Vide *Ex parte Overton*, Post, as to Affidavits upon Petitions to stay Certificates.

LINCOLN'S  
INN HALL.  
June 1815.

*Ex parte* SCHOFIELD.—In the Matter of  
LAIDLAW.

A Commission against a Person by the Name of *Laidlow* superseded at the Instance of a Creditor, who had taken out a Commission by his right Name of *Laidlaw*, although the Bankrupt had used as well one Name as the other.—*Sed quære*, Whether the Commission would have been superseded at the Instance of the Bankrupt himself?

~~was~~ the latest. This was an Application on the Part of ~~the~~ Creditor, who had taken out the latter Commission, ~~to~~ supersede the former, on the Ground of the Misdescription; there was also another Petition to supersede ~~the~~ last Commission.

1815.  
~~Ex parte~~  
 SCHOFIELD.  
 —In the  
 Matter of  
 LAIDLAW.

Mr. *Leach* and Mr. *Cullen* in support of the first Commission, contended that *Laidlaw* and *Laidlow* were *idem sonans* in that Part of the Country where the Commission was to be executed. That the Bankrupt was as well known by one Name as the other, and that he was in the Habit of receiving Bills of Parcels, and Letters, &c., and of accepting and paying Bills of Exchange, &c. as *Laidlow*, and of frequently signing and recognising that as his Name. There were Affidavits to those Points.

Sir *Samuel Romilly* and Mr. *Montagu*, *contra*. It could not be pretended that he had ever assumed the Name of *Laidlow*, or that his Name was not in Fact *Laidlaw*, or that he had not generally signed and used that Name.

*The Lord CHANCELLOR.*

That *Laidlaw* and *Laidlow* are *idem sonans*, is a Point, which any Person has sufficient judicial Information to decide. The next Point is, that the Bankrupt has been in the Habit of using the Name of *Laidlow*, and that therefore, as against himself, the Consequence is conclusive; and perhaps, if he himself were now disputing this Commission, it would be difficult to say, that he could get rid of the Effect of the Use of that Name. I cannot however carry it to the Extent to which it has been put in Argument; that because the Bankrupt himself would be barred by that Description of himself, the  
 great

1845.

*Ex parte*  
SCHOFIELD.—In the  
Matter of  
LAIDLAW.

great Seal ought not to set aside the Commission. It is a nice Question: but if *Laidlaw* be his real Name, as indeed it is, every individual Debtor, or Person against whom an Action is brought, has in each successive Case a Right to put the Assignees upon Proof, that they can sustain a Commission against him as *Laidlow*; although, on the other Hand, it is quite clear, that if his Name be *Laidlaw*, the Commission will be good, although he may have used that of *Laidlow* (a). The Question, whether the great Seal has issued a Commission against a Man by a wrong Name, and whether, being so issued, it can be supported upon the Ground of *idem sonans*, opens to so many Inconveniences, that with a Commission against him in his right Name, I think it is a Case which calls for the Interference of the Court; the Court has frequently so interposed. I shall therefore supersede this Commission, but under all the Circumstances of this Application, shall do so without Costs.

(a) *Stevens v. Elizée*, 1 *Baldwin, Ante*, p. 20. The cle-  
Vol. 360. 3 *Camp. N. P.* rical Error in the Commission  
Cases, 256. was not in the Name of the  
Note in the Matter of Bankrupt, but of his Partner.

LINCOLN'S  
INN HALL.

*Ex parte* HERBERT.—In the Matter of HOOK-  
HAM (a).

THIS Petition prayed that a Commission, which had issued against *Hookham*, as "*William Hookham*, "Waterman, Dealer and Chapman," might be superseded,

(a) 2 *Vcs. & Beamcs*, 399.

upon

upon the Ground, that no Trading within the Bankrupt Laws was specified; the Bankruptcy had not been declared, and the Petitioner was prepared to issue another Commission.

*The Lord CHANCELLOR.*

“ Dealer and Chapman” has been held in itself sufficient (a); and the general Statement, that the Bankrupt got his Living by “ Buying and selling,” will admit the finding of any particular Trading.

Petition dismissed.

(a) 1 Cooke, 43.

1815.

*Ex parte*  
HERBERT.

—In the  
Matter of  
HOOKHAM.

*Ex parte* BLAGDEN.—In the Matter of HEARN.

THE Wife of the Petitioner was, previously to their Marriage, entitled to a Share of a Ship called the *Theodosia*, of which the Bankrupt was also a Part Owner. The Ship had been insured, and was lost. The Underwriters adjusted and settled the Loss with the Bankrupt, as the managing Owner, and £525 was the Proportion of the Adjustment, which, at the Time of the Marriage, the Wife of the Petitioner was entitled to receive from the Bankrupt.

LINCOLN'S  
INN HALL,  
Aug. 1815.

A Debt due to the Wife *dum sola*, cannot be set off in Bankruptcy against a Debt due from the Husband.

Where a

The Wife of the Petitioner was also entitled to the Loss attaches upon a Policy of Insurance after a Bankruptcy of the Insured, it constitutes a Cause of Action in the Assignees; not an Interest in the Bankrupt admitting a Set-off.

Share

1815.

*Ex parte*  
**BLAGDEN.**  
 —In the  
 Matter of  
**HEARN.**

Share of another Ship called the *Hazard*, of which the Bankrupt was interested in a Tenth. Of this Vessel the Petitioner acted as the managing Owner, and as such became, previously to the Month of *August* 1812, indebted to the Bankrupt in £254 as his Proportion of the Earnings. The Commission issued on the 13th of *August* 1812. On the 25th of the same Month the *Hazard* was captured, and the Petitioner received the Amount for which it had been insured; of this the Bankrupt's Proportion amounted to £334 : 12s.

The Petitioner therefore claimed a Right to set off the two Sums of £254 : 4d. and £334 : 12s., making together the Sum of £588 : 12s. 4d., against the Sum of £525 due to him in Right of his Wife, in Respect of the Ship *Theodosia*; offering to pay the Difference to the Assignees; or if the Court should be of Opinion that he was not entitled to set off the £334 : 12s. as having been received since the Bankruptcy, then that he might be entitled to set off the £254 : 4d. against the £588 : 12s. 4d. and prove for the Difference; and that the Assignees might in the mean Time be restrained from bringing any Action to recover what was due to their Bankrupt.

Mr. *Heald*, in support of the Petition, cited *Miles v. Williams* (a); that Equity admitted a Set-off between Parties, in Cases where, according to legal Strictness, it would be excluded: and the Administration in Bankruptcy was as much equitable as legal, *Ex parte Stephens* (b). That under the Statute 5 Geo. II. c. 30.

(a) 1 P. Will. 249. where due to the Wife *dum sola*, it was ruled by the Court of though unrecovered, are assignable by the Commissioners on the Husband's Bankruptcy of the Husband, and that Debts (b) 11 Ves. 24.

s. 28. (a) the Set-off in Bankruptcy depended upon the fair Result of the Balance of general Accounts. *Ex parte Boyle (b), Rumsey v. George (c).*

Sir Samuel Romilly and Mr. Montagu contended, that this was not a Case of mutual Debt and Credit, raising a Set-off in Bankruptcy; and that *Ex parte Stephens* involved Circumstances of peculiar Fraud and Hardship.

1815.  
~  
*Ex parte*  
BLAGDEN.  
—In the  
Matter of  
HEARN.

*The Lord CHANCELLOR.*

The Benefit of the Policy which arose upon the Capture of the *Hazard* was not an Interest in the Bankrupt, but a Cause of Action in the Assignees; how can that be set off against a Debt due from the Bankrupt? Next as to the Debt due to the Wife, in respect of her Interest in the *Theodosia*, how could that be a Matter of strict Set off at Law, or comprehended within the Description of mutual Debts and Credits in the 5th Geo. II. ? Neither, I apprehend, is it assisted by any equitable View of it. The Husband could not file a Bill in this Court, without making the Wife a Party to the Suit, and thereby letting in her equitable Claim upon the Fund. There are certainly Difficulties in the Decision of *Ex parte Stephens*, which perhaps the strong Circumstances of Fraud in that Case could alone have obviated.

The Petition was dismissed.

(a) Vide *Christ.* on this Section, 1 B. L. 252. 278. (c) *Ante*, 108. 1 *Maule and Sel.* 176.  
(b) *Cooke's Bankrupt Law*, 596.

*Ex*



1815.

LINCOLN'S  
INN HALL,  
Aug. 1815.

*Ex parte* BARROW.—In the Matter of SLYTH.

Upon Dis-  
solution of  
Partnership  
between *A.* and  
*B.*, it is agreed  
that until *A.* be  
provided for, *B.*  
shall allow him  
a third of the  
Profits; *B.*  
afterwards  
forms a Part-  
nership with *C.*  
and carries into  
it the Stock of  
*A.* and *B.* A  
Commission  
issues against  
*A.* and *B.* Held  
that after the  
Satisfaction of  
the Creditors  
of *B.* and *C.*,  
the joint  
Effects of *B.*  
and *C.* were

*SAMUEL Slyth*, from *December* 1804 to *December* 1811, carried on Business as a Chinaman, in *South Molton Street*, in Copartnership with his Son. In *December* 1811 the Partnership was dissolved; and upon that Dissolution the following Agreement was entered into between them: "We do hereby consent and agree with each other, to dissolve the said Copartnership and Business of Chinamen, which has been transacted by us for these six Years last past, as follows; the Dissolution shall take Place the 31st of *December* next, and we do consent and agree with each other, to have all Matters, respecting the final Adjustment of the Firm, settled by Arbitration. In Consideration of which *Samuel Slyth*, Senr., does promise and agree to allow *Samuel Slyth*, Junr., one-third Part of the real Profits arising from the Business, until there can be some Situation provided for him the said *Samuel Slyth*, Junr., adequate to the above. In witness, &c."

No Adjustment of the Affairs of the Partnership of *Slyth* the Elder and *Slyth* the Younger ever took Place, either by Arbitration or otherwise; but *Slyth* the Elder continued in the Possession of the Stock in Trade and

the separate Property of *B.*, and not the joint Property of *A.* and *B.*

Under that Agreement *A.* is a Partner with *B.* as to a third of his Interest, but is not a Partner with *B.* and *C.*

Whether Property, left by a dormant Partner, in the Possession of the ostensible Copartner, is within the Statute of *James—Quære.*

Effects

Effects ; and on the 1st of *January* 1812, formed a new Partnership with *John Gyles*, in the same Business of Chinaman, in *Oxford Street*, removing thither the Stock of the former Firm. On the 9th of *June* 1812, a Commission of Bankrupt issued against *Slyth* the Elder and *Slyth* the Younger, and they were found Bankrupts. The Assignees under this Commission possessed themselves of all the joint Effects of *Slyth* and *Gyles* ; and to an Amount more than sufficient to satisfy the joint Creditors of that Firm. And *Gyles*, who was solvent, having by an Arrangement with the Assignees relinquished his Claim upon the Surplus of that joint Estate, it remained in their Hands, subject to this Question, whether it was to be considered as the sole and separate Property of *Slyth* the Elder, and as such, applicable to the Payment of his particular Creditors ; or as the joint Property of *Slyth* the Elder and *Slyth* the Younger, and as such, distributable among the Claimants upon that Firm.

1815.  
*Ex parte*  
 BARROW.—  
 In the Mat-  
 ter of  
 SLYTH.

This Point was raised upon the present Petition.

Mr. *Leach* and Mr. *Collinson*, for the separate Creditors of *Slyth*.

Sir *Samuel Romilly* and Mr. *Montagu*, for the joint Creditors of *Slyth* and Son.

*The Lord CHANCELLOR.*

Upon the Dissolution of the Partnership between *Slyth* the Father and Son, the Agreement in Effect is, that all Matters respecting the final Adjustment of the Partnership shall be settled by Arbitration, and until *Slyth* the Son shall be otherwise adequately provided for, his Father shall allow him a third Part of the Profits  
 of

1818.

*Ex parte*  
 BARROW.—  
 In the Mat-  
 ter of  
 SLYTH.

of the Business. Had it rested thus, it is clear that *Slyth* the Younger, being entitled to a Third of the Profits, would have been still a Partner with his Father; and it is equally clear, supposing there had been no Bankruptcy, that the Property which had belonged to them, and the Transfer and the Assignment of it by the one to the other, were Matters still dependant upon Arbitration, and as such, rendering it difficult for the Father to say that the Property was his. On the other Hand I conceive, although the Property had not been actually transferred, that *Slyth* the Younger being a dormant Partner, and the Father being permitted to deal with this Property as his own, at least a Question would have arisen, even if no third Person had interposed, whether the dormant Partner could have said, as against the separate Creditors of the other, that he could apply, in Payment of the Debts of the Partnership, that Stock, the Order and Disposal of which he had consented to leave to his Father (a). The Matter however does not rest so: the Father afterwards enters into Partnership with another Gentleman of the Name of *Gyles* in this Business of Chinamen; *Slyth* the Elder, carrying into that new Partnership the remaining Stock of the old Concern, and blending it with the Stock of *Slyth* and *Gyles*; and they, in the Course of their Dealings and Transactions, introducing new Stock and intermixing it with the old, as the visible Property of *Slyth* the Father and *Gyles*. Now *Slyth* the Son was no Partner in this Partnership: for although *Slyth* the Father might be obliged to give one-third of his Profits to *Slyth* the Son under this Agreement, yet I take it to have been long since clearly established, that a Man may become a Partner with A., where A. and B.

(a) *Coldwell v. Gregory*, *Ante*, p. 149. Vide the next Case.

are Partners, and yet not be a Member of that Partnership which existed between *A.* and *B.* In the Case of Sir *Charles Raymond*, a Banker in the City, a Mr. *Fletcher* agreed with Sir *Charles Raymond*, that he should be interested so far as to receive a Share of his Profits of the Business, and which Share he had a Right to draw out from the Firm of *Raymond* and Co. But it was held, that he was no Partner in that Partnership, had no Demand against it, had no Account in it, and that he must be satisfied with a Share of the Profits arising and given to Sir *Charles Raymond*. In regard to this present Case, after the new Partnership between *Slyth* the Elder and *Gyles*, and after the Property was carried into their Shop, that Stock was (wherever the Property was), in the Order and Disposition of *Slyth* the Elder and *Gyles*; and *Slyth* the Younger was not a dormant Partner in that Partnership, but his only Demand would be (taking the Statute of *James (a)*, into Consideration) a Demand of a third Share of the Profits of the Father; but he seems to have permitted the Property to have become Property visible to the World, of that new Partnership of which he was not a constituent Member. It is difficult to maintain that it is to be the Property of *Slyth* the Younger and Elder, to pay the joint Creditors of *Slyth* and *Gyles*; and then, as to that which remains, *that* should become a Part, not of the separate Property of one of those whose joint Creditors have been paid, but of *Slyth* the Younger and Elder, in the former Partnership. I am of Opinion, that it is the separate Property of *Slyth* the Elder, and that the Creditors must be paid accordingly.

1815.

*Ex parte*  
BARROW.—  
In the Mat-  
ter of  
SLYTH.

(a) 21 Jac. I. c. 19.

LINCOLN'S

INN HALL.

Aug. 1815.

Whether a  
dormant Part-  
ner is within  
the Statute of  
*James, quære.*

*See*  
*Strickland v. Lister.*

*Ex parte* DYSTER.—In the Matter of MOLINE.

**T**HIS Petition raised, among other Points, the Question whether a dormant Partner is within the Statute 21 *Jac. I. c. 19*, with Respect to his Share of Partnership Property left in the ostensible Possession of his Copartner.

Sir *Samuel Romilly* and Mr. *Roupell* for the Petitioner, cited *Coldwell v. Gregory, Ante, p. 149.*

Mr. *Hart*, Mr. *Bell*, and Mr. *Montagu contra.*

*The Lord CHANCELLOR.*

I cannot decide the Questions which arise in this Case without legal Assistance. The first, whether the Assignees had a Right to possess the joint Property of *Dyster* and *Moline*, of which the latter only was the visible Owner, is the Case which, of all others, appears to come within the Act (21 *Jac. I. c. 19.*); and I think I should have no Difficulty in persuading the Barons, who decided *Coldwell v. Gregory*, that the Report which is given of the Case is, to say the least, not satisfactory. It is clear that the Doctrine of Execution does not decide the Question at all, as the Creditor in Execution can only take that which is the Property of the Creditor, whereas in Bankruptcy, the Assignees may take whatever appears to be in the Order and Disposition of the Bankrupt. I should wish therefore to decide the present Case, with the Assistance of the Chief Baron, and of Mr. Baron *Richards* who concurred in the Judgment of *Coldwell* and *Gregory*, and the Petition may come on in their Presence

sence when we meet again. The other Question (a) whether the Policy of the Law will allow a Debt to arise out of these Transactions, is of very great Importance, and may be discussed at the same Time.

1815.  
*Ex parte*  
 DYSTER.—  
 In the Matter of  
 MOLINE.

(a) The other Question was this: *Dyster* was a Broker of the City of *London*, and as such, by his Bond to the City in a Penalty of £500, and by the Oath taken upon his being admitted a Broker, was precluded from acting as a Principal: as a Principal however he had had joint Dealings with *Moline*, upon the Balance of which he claimed to prove a considerable Balance.



*Ex parte* OVERTON.—In the Matter of RUSHTON.

LINCOLN'S  
 INN HALL,  
 Aug. 1815.

**T**HIS was a Petition to stay a Certificate. On the 19th of *June*, the Attendance of the Parties had been ordered by the *Lord Chancellor*. The Affidavits in support of it had been sworn on the 17th of *June*, and filed on the 18th. The Petitioner resided at *Birmingham*.

Affidavits in support of Petitions to stay Certificates, are from Necessity an Exception to the Rule that Affidavits sworn

The Admissibility of the Affidavits was opposed on the Cases *Ex parte Northwood* (a), &c. On the other Hand, it was contended, that the Rule relied on did not apply to

previously to the answering of the Petition are inadmissible in Evidence.

False Swearing, not strictly amounting to Perjury, is an indictable Offence as a Misdemeanor.

(a) *Ante*, 246.

1815.

*Ex parte*  
OVERTON.

—In the  
Matter of  
RUSHTON.

a Petition to stay a Certificate, as by the general Order (a), the Affidavits in support of it must be brought into the Office at the same Time with the Petition.

*The Lord CHANCELLOR.*

The general Order certainly creates that Difficulty; but although an Affidavit falsely sworn, under such Circumstances, might not be the Subject of an Indictment as Perjury, yet it would constitute a Species of Misdemeanor, and be punishable as such.

The Affidavit was admitted.

(a) G. O. 12th April, 1796.

# ABSTRACT

OF

## CONTEMPORANEOUS CASES.

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*Ex parte* WATSON.

2 *Vesey and Beames*, 414, 415.

May 2, 1814.

**W**ATSON, engaged in Partnership with *Thomas and George Nelson*, died intestate, leaving a Widow, and infant Children. The Widow took out Administration. The Capital of *Watson* due from the Partnership, was £25,155: 3s: 9d. The Widow entered into Partnership with the *Nelsons* for a Term of ten Years; agreeing that her late Husband's Property in the former Partnership should continue in the new one.

A joint Commission of Bankruptcy issued against the Firm. *Elizabeth Watson*, as Administratrix, offered to prove a Debt of £17,424: 9s: 8d., the Amount of Principal and Interest due from the Partnership to her Children. The Proof being rejected, this Petition was presented, praying that it might be received.

*The Lord* CHANCELLOR.

The Administratrix committed a Breach of Trust, by continuing this Money in the Trade; and the Partners, knowing that a certain Proportion belonged to the Children, who, being Infants, could not contract, held this Money as Debtors to the Children; as if it had been placed with them by Way of direct Loan. If it had been for the Benefit of these Children to prove against the separate Estate of their Mother, they might have done so; but it does not follow that they may not prove against the Partnership, having possessed the Property of these Infants under Circumstances raising a clear Assumpsit.

The Order was made accordingly.

Proof in Bankruptcy, in respect of Trust Property of Infants, continued by the Administratrix in the Trade in which the Testator was engaged, carried on by the Bankrupts, constituting a new Firm of which the Administratrix was a Member; and the Infants may prove either against the separate Estate of the Administratrix, or the joint Estate, as may be most advantageous for them.



## PRICE'S Case.

June 25, 27, 28,  
1814.

3 Vesey and Beames, 23, 24.

A Bankrupt is, under the Statute 5 Geo. II. c. 20, s. 5, protected from Arrest, through the whole Period of his Examination, enlarged by the Commissioners, though they had omitted to indorse the Adjournment on his Summons.

**P**PRICE the Bankrupt, having been taken in Execution, under the Circumstances as to his enlarged Examination stated in the Margin, was ordered to be discharged upon Motion, of which the Officer and the Attorney in the Action had been served with Notice.

*Vide ante. Ex parte Temple. Ex parte* in the Note, Vol. I. p. 200.  
*List, P. 22. Ex parte Ross, and the Cases*



*Ex parte* CARR.

3 Vesey and Beames, 108.

**A** WILFUL Misrepresentation, as to Credit (*a*), whereby one Person is induced to trust another, gives a Remedy, in Damages, on the Ground of Fraud: but administered with great Caution in Bankruptcy, where the Evidence of the Party being received must be, in all Particulars, consistent and unambiguous.

(*a*) *Pasley v. Freeman*, 3 T. R. 51. *Ex parte* 1 Bro. C. C. 543. *Montgomeri v. Montgomeri*,  
*v. Bicknell*, 6 Ves. 206. *Neville v. Wilkinson*, 1 Black. 63.



Aug. 17, 1814.

MATTHEWS, *Ex parte*.

3 Vesey and Beames, 125, 126.

Partnership by a public Declaration in an Advertisement of Dissolution.

**I**N January 1814, a Commission of Bankruptcy issued against John Matthews; and on the 18th of March following, a joint Commission issued against him and William Matthews.

The Petition of William Matthews, praying that the joint Commission might be superseded, stated that there was no Pretence for supposing



posing him a Partner with *John Matthews*, except an Advertisement in the *Gazette*, declaring the Partnership between them dissolved on the 24th July, 1813; which Advertisement was inserted for the Purpose of counteracting a Report that they were Partners.

1814.  
MATTHEWS,  
*Ex parte.*

*The Lord CHANCELLOR.*

In this Case the Affidavits represent that these Persons were apparent Partners, and declared themselves to the World as such; and the Goods were supplied to both. This must, therefore, be put as the Case of no joint Estate, by the Effect of that Dissolution which has transferred the Property of both to one alone. I cannot possibly decide upon these Affidavits, that there was no Partnership. An Issue must therefore be directed to try the Question of Partnership.

HARRISON'S Case.

Dec. 9, 1814.

3 *Vesey and Beames*, 174.

**A** COMMISSION, dated the 11th of August, being produced to the Commissioners, on this Day, to be opened, they refused to proceed upon it without the Order of the *Lord Chancellor*.

*The Lord CHANCELLOR*

Made the Order; taking the Distinction that, where the Delay was occasioned by the Bankrupt, the Commissioners may proceed: not where it is occasioned by the petitioning Creditor.

JARRETT

Monday, Jan. 24,  
1814.

JARRETT against LEONARD.

2 Maule and Selwyn, 265. 269.

In an Action by a Bankrupt against the petitioning Creditor, to try the Validity of the Commission, Proof that the Bankrupt and petitioning Creditor attended the second Meeting of the Commissioners, and discussed before them the Debt due to the petitioning Creditors, and produced their Accounts; and the Bankrupt objected to Part of the petitioning Creditor's Account; and the Commissioners ticked off such Items in it as they allowed, and struck a Balance of 100*l.*, was held to be Evidence to be left to the Jury, of an implied Admission by the Bankrupt, from his Conduct and Demeanour before the Commissioners, that such a Balance was due, but not of an Adjudication by them, by their own Authority, or of an Award made by them, with the Consent of Parties; and, therefore, where it had been so left to the Jury, the Court granted a new Trial.

IN an Action brought by the Plaintiff, a Bankrupt, against the Defendant, who was petitioning Creditor and Assignee. The Question was as to the petitioning Creditor's Debt.

It appeared that at the second Meeting under the Commission, the Plaintiff and Defendant attended, the latter with his Attorney, and the Debt due to the Defendant was discussed between them, before the Commissioners. The Defendant produced his Account, and the Items of it were ticked off by the Commissioners, as they allowed them.

The Plaintiff also said he had Accounts, and produced them to the Commissioners, who examined and went through the Accounts; and a Balance was allowed by the Commissioners of £100: 18*s.* It was objected that this was not Evidence against the Plaintiff of the Existence of a good petitioning Creditor's Debt; but the learned Judge was of Opinion that it was at least *prima facie* Evidence, and likened it to an Adjudication by the Commissioners, or a Settlement of Accounts before an Arbitrator. A Verdict was thereupon found for the Defendant.

A Rule Nisi for a new Trial was obtained in the last Term upon the same Objection. It was urged that the Commissioners had no Authority to bind the Plaintiff; that the Plaintiff did not constitute them a Judicature, by which he voluntarily submitted to be bound that their Decision was *invitum* (a).

*Jervis, Abbott, and Puller* shewed Cause, and did not insist that what was done by the Commissioners was *res adjudicata*, as if by their Authority, but an Adjustment of the Debt, with the Consent of the Parties.

Lord ELLENBOROUGH, C. J.—As Commissioners they had not Au-

(a) *Pirie v. Menett*, Vol. 1.

thority to conclude the Bankrupt; and it does not appear that they were constituted Arbitrators with the Assent of the Parties. If the Question went to the Jury, upon the Admission of the Party, as it was to be collected from his Conduct before the Commissioners, it was properly left to them: if it was carried farther its Effect was overstated.

1814.  
JARRETT against  
LEONARD.

DAMPIER, J.—I think that I left it to the Jury, rather as a Debt established by the Commissioners, than as admitted by the Party.

*Per Curiam,*

Rule absolute.

HARTOP v. JUCKES.

Saturday, April 30,  
1814.

2 Maule and Selwyn, 438. 440.

**A**CTION for Work and Labour, and for Money had and received. The Plaintiff claimed £7: 16s.: 2d., for his Bill of Fees, &c. as Messenger under a Commission against one *Clarkson*; and £14: 1s.: 10d., for a similar Bill, under a Commission against one *Bartley*. The Jury found a Verdict for the former Sum only; as to which it appeared that the Defendant was employed by the petitioning Creditor as Solicitor, to work the Commission for a Sum certain; a great Part of which Sum he had received.

The Solicitor, under a Commission of Bankruptcy, is not liable, in the first Instance, to the Messenger whom he nominates, for his Bill of Fees; but if the Solicitor agree with the petitioning Creditor to work a Commission for a Sum certain, and receive a great Part of that Sum, he will be liable to such Messenger.

The Defendant was also Solicitor to the other Commission; but there was no such Agreement as to that. The Plaintiff was nominated by the Defendant, and appointed by the Commissioners Messenger to both these Commissions; and his Bills, together with the Solicitor's Bills of Costs, had been allowed by the Commissioners. Neither of the Commissions had been superseded.

The *Attorney General* moved to increase the Verdict, by adding £14: 1s.: 10d. to the Amount of the Bill of Fees, in *Bartley's* Commission. He referred to *Ex parte Hartop* (a). The Solicitor is the Person usually applying to the Messenger, who has no Means of knowing any Thing of the petitioning Creditor; suppose the Commission does not proceed, to whom can he look but the Solicitor? and, if it does proceed, the Solicitor will be entitled to Reimbursement out of the first Funds.

(a) 12 Vesey, 349. Vol. I. 449.

But

1814.  
HARTOP v.  
JUCKES.

But the Court were of Opinion that the Solicitor was not to be regarded, in general, as a Principal; that the Messenger is aware that he is not a Principal, and, upon the opening of the Commission, may ascertain who is the petitioning Creditor; and, though the Solicitor is the Medium through which it is convenient to the Messenger to receive his Bill of Fees, that will not make him a Principal.

Rule refused.

G. Marriott then moved to enter a Nonsuit, on the Authority of a Case (a) before Lord Redesdale, that "Costs in Bankruptcy could not be the Subject of an Action; and that a special Undertaking by the Assignees to pay them made no Difference."

But the Court said that this was different from the Case cited, not being an Action for the Costs; and that the Receipt of the Money for the Business of working the Commission, in which was included the Business of the Messenger, made the Solicitor liable upon the Count for Money had and received. And Lord Ellenborough, C. J. seemed not inclined to accede to what fell from Lord Redesdale, in the Case cited, in its full Extent; but said he should have thought otherwise, where the Party makes a special Agreement.

Rule refused.

*Sed Vide Ex parte Hartop, 12 Ves. 349.*

(a) *Ex parte Dillon, 2 Scholcs and Lef. 110. S. C, Cooke's Bankrupt Laws, 642, 6th Edit.*

Saturday, April 30,  
1814.

MORAVIA and ANOTHER against D. HUNTER and J. W. GLASS.

2 Maule and Selwyn, 444, 445.

In *assumpsit* against two, where one pleads *non assumpsit*, and a Plea of Bankruptcy, and the Plaintiff enters a *nolle prosequi* as to him, as to the several Matters pleaded by him, and the other Defendant pleads *non*

*assumpsit*, the latter is not discharged by *nolle prosequi*.

**I**NDEBITATUS *assumpsit*. D. Hunter pleads, 1st, *non assumpsit*; 2dly, a special Plea of Bankruptcy; 3rdly, a general Plea of Bankruptcy. Glass pleads *non assumpsit*. The Plaintiffs entered a *nolle pros.* as to D. Hunter, as follows: "And the Plaintiffs, inasmuch as they cannot deny the several Matters above pleaded by the said D., freely here in Court confess that they will not further prosecute their Suit against him, the said D." A Verdict having been found against Glass, and Judgment thereon, it was moved by Campbell in Arrest of

Judgment,

Judgment, that the Plaintiffs, by having entered a *nolle prosequi* as to Hunter, "upon the several Matters pleaded by him," had confessed the *non assumptis* as well as the other Pleas; and, therefore, Glass was also discharged. In *Noke v. Ingham* (a) Denison, J. took this Distinction.

1814.  
MORAVIA and  
Another, against D.  
HUNTER and J. W-  
GLASS.

But the Court held that the *nolle prosequi* was in Effect only a Confession, that as far as regards Hunter, he had a Defence on the Matters pleaded by him.

Rule refused.

(a) 1 Wils. 89.

DOE, on the Demise of ESDAILE and OTHERS, against  
MITCHELL and ANOTHER.

Saturday, April 20.  
1814.

2 Maule and Selwyn, 446, 447.

**EJECTMENT** for certain freehold Lands of a Bankrupt, of whom the Lessors of the Plaintiff were the Assignees. The Demise was laid after the Date of the Commission, but before the Assignment, and also before the Bargain and Sale of the Lands in Question by the Commissioners to the Assignees. And, upon Exception taken that the Demise was insufficient, the learned Judge directed a Nonsuit (a).

The Bargain and Sale by the Commissioners to the Assignees of a Bankrupt, of the Bankrupt's Freehold Lands, does not relate to the Act of Bankruptcy, so as to vest the Title in the Assignees from that Time; and, therefore, in Ejectment by the Assignees, upon a Demise laid after the Act of Bankruptcy, but before the Bargain and Sale, adjudged ill.

And now *Laves* moved for a new Trial, on the Ground, that after the Execution of the Bargain and Sale, in the same Manner as after an Assignment by the Commissioners of the Bankrupt's Goods (b), the Assignees were in by Relation to the Act of Bankruptcy.

The Court inquired if there was any Authority, extending the Doctrine of Relation to the Conveyance by the Commissioners of the Bankrupt's Freehold; for without some Authority, it would be going too far to carry it to that Extent; and (no Authority being cited) they said that it remained in the Bankrupt, though not beneficially, until taken out of him by the Conveyance (c).

Rule refused.

(a) *Thomson*, C. B.

(b) 2 Rep. 26. 2 East, 268.

(c) And it is essentially necessary to

complete the Conveyance that the Deed must be enrolled. *Vide Coote*, B. L. 299.

*Ex parte*

Monday, May 9,  
1814.

*Ex parte* BOWNESS, in the Matter of PHILLIPS, a Bankrupt.

2 Maule and Selwyn, 479 to 484.

The Stat. 46 Geo. III. c. 135, s. 2, does not restrain a Creditor from proving under a Commission of Bankrupt a Debt contracted before the Act of Bankruptcy, on which the Commission issued, but after Notice of a prior Act of Bankruptcy.

**P**HILLIPS and Hawkins were Bankers in Partnership; Phillips also carried on the Business of a Wine Merchant. Phillips and Hawkins as Bankers were indebted to Penfold, on simple Contract, in the Sum of £4000. Phillips committed an Act of Bankruptcy, which was known to Penfold; after which Phillips and Hawkins executed joint and several Bonds to Penfold, to secure the £4000 and Interest. Afterwards, Phillips, still continuing his Trade of Wine Merchant, became indebted to Bowness in £800, and committed another Act of Bankruptcy, on which Act a Commission issued against him, and he was declared bankrupt. There was a joint Fund, and Hawkins was not a Bankrupt. Penfold proved, under Phillips's Commission, the Amount of Principal and Interest, due on the Bonds, against the separate Estate of Phillips. Upon the Petition of Bowness to the Lord Chancellor, to expunge the Proof, his Lordship directed the following Question for the Opinion of this Court: whether Penfold was entitled by Virtue of the said Bonds, to prove his Debt under the Commission, as a separate Debt due from Phillips.

Gifford maintained the Affirmative. There could be no Doubt that before the Statute 46 Geo. III. c. 135. s. 2. (a), this Debt would have been proveable notwithstanding the prior Act of Bankruptcy, because it was a Debt contracted before the Act of Bankruptcy on which the Commission issued, and such Debt would have been barred by the Certificate. Debts proveable under the Commission, and Debts to be discharged by the Certificate, are convertible Terms; but Debts, not due at the Time of the Act of Bankruptcy, were not affected by the

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| <p>(a) S. 2. enacts "in all Cases of Commissions of Bankrupt, hereafter to be issued, all and every Person, with whom a Bankrupt shall have really and bona fide contracted any Debt, before the Date and coming forth of such Commission, which, if contracted before any Act of Bankruptcy committed, might have been proved under such Commission, shall, notwithstanding any prior Act of Bank-</p> | <p>ruptcy, be admitted to prove such Debt, and to stand and be a Creditor under such Commission, to all Intents and Purposes whatever, in like Manner as if no such prior Act of Bankruptcy had been committed, provided such Creditors had not, at the Time of such Debt being contracted, any Notice of any prior Act of Bankruptcy."</p> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

Commission.

Commission, and, consequently, not proveable under it: *Bamford v. Burrell* (a). With respect to the petitioning Creditor's Debt, the Law still requires that it should be a subsisting Debt, at the Time of the Act of Bankruptcy on which the Commission issues, *Moss v. Smith* (b): but as to the Proof of Deeds, the Stat. 46 Geo. III. c. 135. s. 2. has afforded this Remedy, in relief both of the Creditor and Bankrupt. It is a remedial Law, not a restrictive one: it is to enable those to prove who, before the Statute, could not prove, not to impose a Limitation on those who could: to say that wherever there has been any Act of Bankruptcy, prior to the contracting of the Debt, a Creditor shall only be admitted to prove his Debt under the Condition there imposed, would be to restrain the Proof of Debts, and not to enlarge it. A mere Act of Bankruptcy, not followed up by any Commission, is of none Effect, *Forster v. Allanson* (c): and it would be strange if by an Enactment, intended to relieve both the Creditor and Bankrupt, the Assignees or petitioning Creditor should be enabled to set up an Act of Bankruptcy, in Derogation of their own Title, which before the Statute they could not have done, in order to defeat the Creditor of his Proof, and the Bankrupt of his Discharge.

1814.  
Es parte BOWNESS,  
in the Matter of  
PHILLIPS, a Bank-  
rupt.

*Marryat contra* said, 1st, that the general Rule was, that if the Debt be contracted subsequently to any Act of Bankruptcy, not to the Act alone on which the Commission is founded, it is not proveable: and, until this Statute, (s. 5.) even the Commission itself was avoided by an Act of Bankruptcy prior to the petitioning Creditor's Debt. The Statute was intended to give a partial Relief in this Respect; that is, to such Creditors as had not Notice of any prior Act of Bankruptcy: consequently it cannot aid in this Case, because the Creditor had Notice. But, 2dly, supposing the Debt would have been proveable before the Statute, yet the Statute has interfered to prevent it: the Enactment clearly imports that in all Cases where the Creditor has Notice, he shall not be admitted to prove. And this Construction seems reasonable; for if the Creditor knowing a Man has committed an Act of Bankruptcy, chooses to give him Credit, he cannot be supposed to give Credit to his Effects; and if the Bankrupt become indebted under these Circumstances, he cannot complain that he remains liable.

Lord ELLENBOROUGH, C. J.—It certainly was the Object of the Act of Parliament to facilitate and give a greater Capacity of proving Debts under certain Terms, and not to abridge it. I feel it unnecessary to go into any other Question. If it had not been doubted by the

(a) 2 Bos. and Pull. 1. (b) 1 Cambr. N. P. C. 439. (c) 2 T. R. 479.



1814.  
 Ex parte BOWNESS,  
 in the Matter of  
 PHILLIPS, a Bank  
 rupt.

learned Mind who has directed this Case, I should not have much hesitated. However, as it is, we will look at it again before we certify.

The following Certificate was sent.

We have heard this Case argued by Counsel, and have considered it, and are of Opinion that *Penfold* was entitled by Virtue of the said Bonds, to prove his said Debt under the said Commission, as a separate Debt due from the said *Phillips*.

ELLENBOROUGH.  
 S. LE BLANC.  
 J. BAYLEY.  
 H. DAMPIER.

Tuesday, May 17,  
 1814.

WILSON and ANOTHER against KEMP.

2 Maule and Selwyn, 549 to 551.

After a general Plea of Bankruptcy, concluding to the Country a Replication that Defendant was before the Commission discharged as a Bankrupt, and that his Estate has not produced 15s. in the Pound, which was pleaded in Maintenance of the Action generally, and with a Verification, was held ill, on a special Demurrer.

**A**SSUMPSIT against the Defendant as Acceptor of a Bill of Exchange. Plea, the general Plea of Bankruptcy concluding to the Country. Replication, that the Plaintiffs ought not to be precluded from having their Action, because, admitting that the Defendant became a Bankrupt, and that the Causes of Action accrued before the Bankruptcy, after the 24th of June, 1732, and after the Statute 5 Geo. II. c. 30, and before the issuing of the Commission against the Defendant, under which he was declared a Bankrupt, to wit, on the 19th Day of October 1807, the Defendant was discharged as a Bankrupt by Virtue of that Act, and that afterwards, to wit, on the 23d August 1811, he was again discharged, &c. and that his Estate has not produced 15s. in the Pound; and the Replication concludes with a Verification and Prayer of Judgment and Damages, &c. Demurrer, assigning for Causes, that the Plaintiffs have not in their Replication accepted the Issue tendered by the Plea, although the same is a material and sufficient Issue, but have proceeded to reply specially Matters which might have been given in Evidence under that Issue: and also for that by the Replication they have attempted to deprive the Defendant of the Benefit of pleading his Bankruptcy generally, according to the Form of the Statute, &c. and to oblige him

to come to a more special and particular Issue upon Matters which he is entitled to give in Evidence, under that general Plea; and also for that the Replication is pleaded, and concludes in Maintenance of this Action generally; whereas, if the Matters alleged be true, the Plaintiffs are not upon the Pleadings herein entitled to Judgment against the Defendant, except in Respect of his Estate and Effects, according to the Form of the Statute, &c. Joinder.

1814.  
WILSON and Another against KEMP.

And the Court, without hearing any Argument in Support of the Demurrer, were of Opinion that upon both Causes assigned, the Replication was ill; 1st, because it prayed Judgment generally, instead of being confined to the future Estate and Effects of the Bankrupt; 2dly, because a Replication, concluding with a Verification, could not be pleaded in Reply to a Plea concluding to the Country. And in Answer to *Campbell*, who said that, in *Thornton v. Dallas* (a), precisely the same Replication was pleaded, *Dampier, J.* observed that it had been otherwise decided many Times, although in *Thornton v. Dallas* no Objection was made upon that Ground.

(a) *Doug.* 46.

MILLS, Assignee of E. CHAMBERS, H. C. GRANGER, and R. CHAMBERS, Jun. (Bankrupts) against BENNETT.

Wednesday, May 18,  
1814.

2 Maule and Selwyn, 556 to 558.

THE Plaintiff sued as Assignee under a joint Commission against the three.

No Notice having been given that the Defendant intended to dispute the Proceedings under the Commission, the Deposition made before the Commissioners was put in and read, which stated that the three Bankrupts carried on a Banking Concern, under the Firm of *Chambers, Granger, and Chambers*, at *Collumpton*; that on or about the 29th May 1812, they absented themselves from the Banking-house in *Collumpton*, shut up the same, and stopped Payment, for the Purpose of avoiding and delaying their Creditors. It was proved however, that *E. Chambers* was the only Partner who resided at *Collumpton*, and transacted

Where one of three Partners in a Banking Concern, who resided at the Place where the Banking-house was, and was the only Partner who transacted the Business, the other two residing at a Distance from it, absented himself from the Banking-house, shut it up, and stopped Payment: Held that this was not Evidence of a

joint Act of Bankruptcy by all three.

The Defendant, though he has given no Notice that he intends to dispute the Proceedings under the Commission, may, nevertheless, give Evidence to disprove the Act of Bankruptcy.

the

1814.  
 MILLS, Assignee of  
 E. CHAMBERS, H.  
 C. GRANGER, and  
 R. CHAMBERS, Jun.  
 (Bankrupts) against  
 BENNETT.

the Business there; the other two residing, one in *London*, and the other at a considerable Distance from *Collumpton*.

The learned Judge (a) doubted upon this Evidence, whether it amounted to Proof of an Act of Bankruptcy by all the three: but he permitted the Plaintiff to take a Verdict, with Liberty to the Defendant to move for a Nonsuit. Accordingly a Rule *Nisi* was obtained in this Term for that Purpose.

*Gifford* (with *Lens*, Serjt.) now shewed Cause, and submitted that where no Notice is given, the Proceedings must be taken as conclusive against the Party of the Act of Bankruptcy therein alleged. But, 2dly, the Evidence here did not disprove its being a joint Act of Bankruptcy by all the three Partners. The Stat. 1 Jac. 1. c. 15. does not require that the Party should absent himself from his Dwelling-house; it says "otherwise absent himself:" and, therefore, if Partners, having a known Place of Trade for carrying on their Concerns, shut it up for the Purpose of delaying their Creditors, it is within the Meaning of this Clause, though they do not depart from their Dwellings—*Judine v. Da Cossen* (b).

*Gaselee contra*, denied that the shutting up of the Counting-house, by one of the several Partners, was an Act of Bankruptcy by all.

The Court agreed that there was not sufficient Evidence of a joint Act of Bankruptcy, by all the three Partners. Upon the other Point Lord *Ellenborough*, C. J. said it had been decided that the Proceedings were not conclusive (c); and *Bayley*, J. observed, that the 49 Geo. III. c. 121. s. 10. only enacts that the Proceedings under the Commission shall be Evidence to be received of the Trading and Bankruptcy, but, like all other Evidence, it is liable to be controverted; and *Dampier*, J. added, that at first he had been inclined to think that the Act meant to make the Proceedings conclusive; but, on looking into the Act, he found it was otherwise.

Rule absolute.

(a) *Bayley*, J. (b) 1 N. R. 234. (c) See *Ellis v. Shirley*, 3 Camp. N. P. C. 424.

HEATH and OTHERS v. HALL and PORTER.

May 2, 1812.

4 Taunton's Reports in C. B. 326. 329.

**THIS** was an Action brought by the Plaintiffs to recover Money which they had paid to the Defendant *Porter*, to be employed in his Trade; and for which they contended that both the Defendants were liable, because there had been a secret Partnership between them. *Porter* pleaded Bankruptcy and Certificate; whereupon the Plaintiffs entered a *nolle prosequi* against him, and proceeded against the Defendant *Hall*, who pleaded the general Issue. Verdict for the Plaintiffs.

*Vaughan*, Serjeant, moved to set it aside, upon the Ground that the Chief Justice (a) had received the Evidence of *Spriggins*, an Agent of the Plaintiffs, through whose Hands the Money was advanced to the Defendants; and the Objection to his Competency was, that he was a Creditor of the Defendants, and the Effect of the Evidence would be to make *Hall* liable to all the Debts of *Porter*, and thereby to increase the Fund for Payment of his own Debt. The Answer given to this Objection was, that the Plaintiffs had purchased of *Spriggins* the Debt due to him from the Defendants for 10*s.* in the Pound: but no Assignment had been executed by *Spriggins*; it had only passed by Parol: but the Plaintiffs had given *Spriggins* Credit for that Amount, in the Account which he kept with them. It was urged, for the Defendants, that this did not divest the Witness of his Interest, for that this Agreement was not binding. The second Ground was, that the Plaintiffs had proved their Debt under the Commission against *Porter*; that, in the Affidavit they made on that Occasion, they must necessarily have sworn, with a Knowledge of the Partnership, that the Debt was due to them from the Defendant *Porter* alone, and not from *Porter* and *Heath*; for they could not prove a joint Debt against the Effects of *Porter* only. They had therefore made their Election to proceed under the Bankruptcy for this, as a separate, and not as a joint Debt; the Defendants being protected by the Statute 49 Geo. III. c. 121. s. 14; and that they were estopped from now proving it to be otherwise.

A Creditor who has assigned his Debt is a competent Witness, to increase the Fund out of which the Debt is to be paid.

An equitable Assignment of a Debt may be by Parol as well as by Deed.

The Stat. 49 Geo.

III. c. 121, s. 14, which enacts that Creditors, proceeding under the Commission, shall be deemed to have made their Election not to sue, does not extend to prevent a Creditor, who proves a joint Debt under a Commission against one Partner, from suing the others.

MANFIELD, C. J.—If two Men agree for the Sale of a Debt, and one of them gives the other Credit in his Books for the Price, that may be

(a) *Manfield*, C. J.

1812.  
HEATH and Others v.  
HALL and PORTER.

a very good Assignment in Equity; its resting in Parol is no Objection: even a Deed could not assign it at Law. If there had been an Assignment by Deed, the Assignor must sue at Law; but he would, notwithstanding, be a good Witness in this Suit. Could it be said that a mere naked legal Trustee for the Plaintiffs, without an Interest, was not a competent Witness? As to the other Point, the Plaintiffs are entitled to prove their joint Debt against *Porter's* Estate, although they cannot receive a Dividend until *Porter's* separate Debts are fully paid. Is it meant to be insisted that any Act has passed, so monstrously unjust and absurd, that, where a joint Debt is due from two Partners, and a Commission issues against one of them, the Creditor cannot prove his Debt under the Commission, and also sue the other Partner? The Practice of the Court of Chancery has varied much within my Memory; it used to be that a joint Creditor might, under a separate Commission, prove and receive a Dividend: but now he cannot proceed to receive a Dividend: unless there is a Surplus he can only prove his Debt.

A Rule was granted on the first Point alone, which was afterwards by the Court discharged without Argument.

May 31, 1818.

DOUGHTERLONY and OTHERS, Assignees of GAIRDNER'S,  
Bankrupts, v. EASTERLY and OTHERS.

4 Taunton, 888. 893.

To enable the Holder of a Bankrupt's Acceptances to avail himself of them, in an Action by the Assignees against himself on his own Acceptance, by Way either of Set-off or mutual Credit, he must most distinctly prove either that the Obligation on himself to pay the Bill so set off, subsisted before the Bankruptcy, or that there was a mutual Credit created in the Original of the Bills.

THE Plaintiffs declared on a Bill, dated the 2d June 1810, drawn by the Defendants at *Newcastle-upon-Tyne*, upon Messrs. *Puller, London*, at seventy Days' Date, for £336: 7s.: 10d., payable to the Defendants' Order, accepted by the Drawees, and indorsed. The Defendants gave Notice of a Set-off for £406: 7s. upon a Bill of that Amount, dated 14th May, 1810, drawn by *A. Gairdner and Co.* (the Style of Bankrupts' House at *Edinburgh*) in their own Favour, at four Months after Date, accepted by the Bankrupts, and indorsed by the Drawers to the Defendants: and upon another Bill for £299: 10s.: 8d., dated 29th July 1810, drawn by *A. Gairdner and Co.* upon and accepted by the Bankrupts, payable three Months after to the Drawers' Order, and by them indorsed to the Defendants: and also for Interest, Money lent, &c., being Monies and Effects which the Defendants

Defendants had delivered to the Holders of those two Bills for the Purpose of taking them up, with Interest and Costs, in Consequence of the Bills being dishonoured by the Bankrupts: also in respect of a Bill of 12th June 1810, for £406:12s., drawn by the Defendants on, and accepted by C. and R. Puller, at three Months after Date, payable to the Defendants' Order, and by them indorsed and delivered to Atkinson and Co., and by them to the Bankrupts, and by them to the British Linen Company, in whose Hands the Defendants paid the same, with Interest and Costs thereon; which last-mentioned Bill was given by the Defendants, or by Atkinson and Co., for them, in Exchange for the above first-mentioned Bill of £406:7s.: and also in respect of another Bill for £300, dated 24th July 1810, drawn by the Defendants upon, and accepted by C. and R. Puller, payable three Months after Date to the Defendants' Order, and by them indorsed and delivered to Atkinson and Co., and by Atkinson and Co. to the Bankrupts, and by them to Powell, in whose Hands the Defendants paid the same: which Bill for £300 was given by the Defendants, or by Atkinson and Co. for them, in Exchange for the above-mentioned Bill of £299:10s.: 8d. Upon the Trial it was proved that the Plaintiffs and Defendants had been in the Practice of assisting each other by mutual Acceptances: that the Defendants had accepted the Bill, upon which this Action was brought, for the Accommodation of the Bankrupts, who had accepted a Bill at the same Time, of the like Amount, for the Accommodation of the Defendants, each Party engaging to provide for the Payment of their own respective Acceptances. When the Bills became due, the Defendants failing to pay their Acceptance, the Bankrupts paid both, so that nothing was due from the Bankrupts to the Defendants on this Transaction. The Defendants offered in Evidence under the Set-off, the Bills upon which they had given Notice of Set-off, accepted by the Bankrupts, and overdue, and unpaid by the Acceptors; but they did not know upon what Consideration the Bankrupts accepted them, nor at what Time, or upon what Consideration those Bills had come to the Defendants' Hands, nor that the Defendants' Names were on them, nor that there was any original Connection between the Defendants and these Bills; and it was clear that the Bills were, in their original Concoction, in no wise connected with the Bill on which the Action was brought, and that the Bills were not in the Defendants' Hands at the Time of the Bankruptcy of Gaiddners. *Lens* Serjeant, for the Defendants, abandoned his Claim of Set-off; but contended that these Bills constituted a mutual Credit, under Stat. 5 G. II. c. 30. s. 38.

1813.  
DOUGHTERLONY  
and Others, Assignees  
of GAIRDNERS,  
Bankrupts, v. EAST-  
TERLY and Others.

The Jury, however, under the Direction of *Mansfield*, C. J. found a Verdict for the Plaintiffs.

VOL. II.

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1813.  
 OUGHTERLONY  
 and Others, Assignees  
 of GAIRDNERS,  
 Bankrupts, v. EAST-  
 TERLY and Others.

*Leas*, Serjeant, on this Day moved for a Rule *Nisi*, to set aside the Verdict, and have a new Trial. The Fact of the Bills not being in the Defendants' Hands at the Time of the Bankruptcy, he said, did not prevent it from being a mutual Credit. *Smith v. Hodson*, 4 T. R. 211, was stronger than this; there was no Contingency in this Case; for if the Holders had come in under the Commission, they must have resorted to the Defendants for the Deficiency beyond the Dividend. Here, too, the Bill was overdue: *Dickson v. Evans*, 6 Term Rep. 57, *Ex parte Hale*, 3 Ves. 306, are inapplicable. It was not pretended at the Trial that the Defendants had brought up these Bills since the Bankruptcy, as Bills to which they were before Strangers.

∴ The Court granted a Rule, *Nisi*.

*Best*, Serjeant, shewed Cause.

MANSFIELD, C. J.—Whatever other Transactions there may have before been between these Parties, the Bill of 2d June 1810, was balanced by another of the like Amount, and that Transaction was closed. This Case does not seem to come within the Principle of *Smith v. Hodson*. What Indorsements had been on these Bills I know not; whatever had been on the last of them were entirely obliterated. I think, therefore, as I thought at the Trial, that the Defendant is not entitled to set them off.

HEATH, J. CHAMBERS, J. concurred.

GIBBS, J.—I will not say, whether if the Facts were as suggested by the Defendants, they might be entitled to hold it as a mutual Credit; but this is a Case in which the strictest and most particular Proof is required, either that the Obligation commenced before the Bankruptcy to bring it within the ordinary Law of Set-off, or that there was some Connection in the Origin of the Transaction, to bring it within the Cases of mutual Credit.

Rule discharged.

VINCENT

VINCENT and OTHERS, Assignees of DOWSON, v. PRATER.

C. B.  
Nov. 9, 1812.

4 Taurion, 603. 605.

**T**ROVER by the Assignees of a Bankrupt. Two Transactions were proved by the Plaintiffs as Acts of Bankruptcy. A Creditor called at the House of the Bankrupt one Morning, while the Bankrupt was out, and said he must have £50 or £60 that Day: he then went away, leaving Word that he should call again. *Dowson* soon after coming in, and hearing this Message, directed his Clerk to tell the Creditor when he called again that he would not let him have it, and that he should go out of the Way till Dinner-time. He went out accordingly, and the Creditor returning, the Clerk communicated to him what *Dowson* had said. *Dowson* came home to Dinner: the Creditor did not call again. The other Transaction was, that *Dowson* being embarrassed in his Circumstances, at the Instance of three Creditors, appointed a Day for them to come to his Counting-house and examine his Books. Early on that Morning he left his Home, and went to a Public-house in the Neighbourhood, whither he directed his Clerk to bring him Intelligence of what passed with the Creditors; and he assigned as a Reason, that he expected when the Creditors found how bad his Affairs were, if he were present some harsh Language would pass, and possibly they might be induced to arrest him. The Jury found a Verdict for the Defendant.

A Trader left a Message at his House for a Creditor, who had in his Absence called for a Debt, that he could spare no Money, and would not pay him that Day, and would go out of the Way, and stay till Dinner-time. Held that it was for the Jury to consider whether he absented himself to delay a Creditor: and this Evidence warranted their Conclusion that he did not.

So where he absented himself from his House, where his Creditors were, to avoid Irritation and harsh Language.

*Best*, Serjeant, moved to set it aside, and have a new Trial.

The Court held that, as to the first Transaction, the Case had gone to a Jury on a Point that might be fairly raised, whether *Dowson* went out with Intent to delay his Creditor or not. They had found that he had not. The Court could not say the Conclusion was wrong. A Man who intends to delay a Creditor does not name the Hour when he shall return Home. As to the second Transaction, *Dowson* assigned the true Cause of his Absence—to avoid Altercation.

Rule refused.



C. B.  
Nov. 16, 1812.

SHERWOOD, Gent. one, &c. v. BENSON.

4 Taunton, 631, 632.

The Court will not stay Proceedings, in an Action for the Escape of a certificated Bankrupt, taken in Execution, released by the Sheriff upon Production of his Certificate.

**WILKINSON** being taken by the Sheriff, under a Writ of *Capias ad Satisfaciendum*, at the Suit of the Plaintiff, in an Action the Cause of which accrued before his Bankruptcy, produced his Certificate and demanded his Release, with which the Officer complied. The Plaintiff thereupon commenced the present Action against the Sheriff for an Escape.

*Best*, Serjeant, moved for a Rule *Nisi*, that, upon Payment of Costs, Proceedings might be staid: that if *Wilkinson* had taken out a Summons before a Judge, he must, under the Stat. 5 G. II. c. 30, have been discharged.

The Court said, in Case of a Summons the Matter would have come directly under the Cognizance of the Judge, to try whether the Debtor was entitled to his Discharge or not. Here it was brought before the Court collaterally: the Court would not try this Cause upon an Affidavit, nor could they speculate upon what the Damages would be.

Rule refused.

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DOE, on Demise of MAWSON, v. LISTON.

C. B.  
Feb. 11, 1812.

4 Taunton, 741. 744.

If the Title of Assignees of a Bankrupt's Estate, Strangers to the Record, comes in Question incidentally, it must be proved in the same Mode as before the Statute 49

Geo. III. c. 121, although no Notice of contesting the Bankruptcy has been given by the opposite Party.

In proving the Title of Assignees of a Bankrupt, if the petitioning Creditor was the Assignee of another Bankrupt, it is necessary to prove the Title of the petitioning Creditor to be such Assignee, by all the like Proof by which the Title of the Assignee in Question is to be proved.

**EJECTMENT.** The Plaintiffs were entitled under a Writ of *Elegit* (which they had sued out upon a Judgment in Debt, obtained against *Aydon* and *Elwell*) to recover the Premises against the Defendants, to whom the Land had been demised by *Aydon* and *Elwell*, unless the Estate had before the *Elegit* vested in the Assignees of *Aydon* and *Elwell*, who had become Bankrupts. The Plaintiffs contended,

that

that in order to prove the Title of the Assignees, it was necessary to prove the Bankruptcy of *Aydon* and *Elwell*, and, to prove that, it was necessary to prove the Debt of the petitioning Creditors, who were the Assignees of *Swaine* and Co.; it was therefore necessary to prove the Bankruptcy of *Swaine* and Co. To this it was answered that the Plaintiffs had given no Notice, as required by the Statute 49 Geo. III. c. 121. s. 10. But *Wood B.* held that, as the Title of the Assignees only incidentally came in Question in the Course of the Defence, this was not a Case to which the Statute was applicable. The Jury found a Verdict for the Defendant, with Liberty to move to enter a Verdict for the Plaintiff, if the Court should be of Opinion that he was entitled to recover.

1812.  
DOE, on Demise of  
MAWSON, v.  
LISTON.

*The Court:*

The Assignees are not Parties to this Record; and the Statute can only apply to Persons who might have Knowledge that the Bankruptcy might be set up, and therefore could give Notice of their Design to contest it. The Assignees of *Swaine* must previously connect themselves with the Bills, in order to shew that they had a Right to pay the Bills; and they could not, without proving themselves to be Assignees through the Medium insisted on.

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COLES v. BARROW and ANOTHER, Assignees of COLES.

C. B.  
Feb. 12, 1813.

4 Taunton, 754. 760.

THIS was an Action for Work and Labour. The Plaintiff had been the Owner of a Cloth Manufactory. He had since become a Bankrupt, and had not yet obtained his Certificate. After his Bankruptcy the Assignees deemed it beneficial to the Bankrupt's Estate to continue the Work. They employed the Bankrupt in superintending the Work, and also in working at the Looms and other manual Operations. The Plaintiff proved no Contract for any specific Salary, but one of the Defendants had paid him Money from Time to Time, to the Amount of 7s. per Week, and had been heard to say that he ought to have much more; some Witnesses estimated the Value at 14s. per Week. For the Defendants it was contended that this Action could not be supported; and *Graham B.*, held, and reported that he conceived no such Contract could be formed in Law, between a Bankrupt and his Assignees, and accordingly nonsuited the Plaintiff.

If the Assignees of a bankrupt Manufacturer employ him in carrying on the Manufactory for the Benefit of the Estate, and pay him Money from Time to Time, this is Evidence of such a Contract between him and his Assignees, as will enable him to recover from them a reasonable Compensation for his Work and Labour.

*Pell,*

## CASES IN BANKRUPTCY.

1812.  
 COLES v. BARROW  
 and Another, Assign-  
 nees of COLES.

*Pell*, Serjeant, in Michaelmas Term, 1811, moved for a Rule *Nisi*, to set aside the Nonsuit, and have a new Trial.

MANSFIELD, C. J. observed, that the Work done by a Bankrupt, for the Benefit of his Estate, was in a Degree for his own Advantage, inasmuch as if the Dividends were increased in a certain Ratio, his Allowance was increased; and if there was any Surplus, it was his own.

LAWRENCE, J. observed, that it had been determined that an uncertificated Bankrupt might recover for the Value of his Labour, if his Assignees did not interfere to prevent him (a): but in this Case the Defendants, who were to be considered in two Characters, did interfere.

The Court, with some Difficulty, granted a Rule *Nisi*.

*Best*, Serjeant, in Easter Term, 1812, shewed Cause against the Rule.

MANSFIELD, C. J.—If the Assignees had made an express Contract, it might be very hard to say, that they were not bound to pay; but here is no Evidence of any Contract.

HEATH, J.—Here is a Payment in Part; and it may be questioned whether there is not Evidence of such a positive Contract. If there were not an implied Contract, how could the Assignees justify to the Creditors giving to the Bankrupt any Thing?

CHAMBERLAIN, J.—This Case is infinitely stronger in Favour of the Bankrupt than *Chippendale v. Thomlinson*. Here is an express Assignment. Where the Assignees employ the Bankrupt, and have held all the Benefit of his Labour, and make him a Payment in Part, I think it would be a monstrous Thing if this Action were not maintainable.

*Cur. adv. vult—*

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MANSFIELD, C. J. in this Term delivered the Opinion of the Court.

My two Brothers (b) are of Opinion that the Nonsuit was wrong, and that the Rule must be absolute. I was of another Opinion, as

(a) *Vide Ex parte Cartwright, ante*, and the Cases there collected in the Note.

(b) *Lawrence*, J. had resigned before this Judgment was given, and *Gibbs*, J. was not on the Bench when it was argued.

thinking

thinking that all Rights and all Goods, due to the Bankrupt, are vested in the Assignees. I have never been able to change my Opinion: but I now entertain a considerable Degree of Doubt, on Account of the Opinion of my learned Brothers: the present Rule, therefore, must be absolute, and the Nonsuit must be set aside.

Rule absolute.

1812.  
COLES v. BARROW  
and Another, Assign-  
ees of COLES.

WALKER v. BARNES.

Monday, Nov. 21,  
1814.

Marshall's Reports in C. B. Vol. I. Page 346 to 348.

**M**R. Serjeant Best obtained a Rule to shew Cause why the Writ of *Fieri facias*, issued and executed on the Judgment which had been signed for the Defendant, should not be set aside; and why the Sum of £38: 5s., levied by the Sheriff under the said Writ, should not be restored to the Plaintiff, he having obtained his Certificate, under a Commission of Bankrupt issued against him. The Cause was tried on the 8th of July 1813, when a Verdict was found for the Defendant, with Liberty to the Plaintiff to move to set it aside: that on the 9th of November following, a Commission of Bankrupt issued against the Plaintiff, on which Day the Plaintiff moved for and obtained a Rule *Nisi*, to set aside the Verdict; that on the 24th of the same Month, the Rule having been previously discharged, the Defendant signed Judgment and taxed his Costs; and that on the 3d October, 1814, the Plaintiff in the mean Time having obtained his Certificate, the Defendant issued a Writ of *Fieri facias*, for the Amount of his Costs, which was the Writ in Question. This Motion was founded on the Authority of *Watts v. Hart* (a), where the Plaintiff having become bankrupt after Nonsuit, and before Judgment, this Court held that the Costs of the Nonsuit were a Debt proveable under the Commission. A Rule *Nisi* was accordingly granted, and

If a Plaintiff, after a Verdict found for the Defendant, but before Judgment signed, become bankrupt, the Costs are not a Debt proveable under the Commission; and Execution for them may issue against him, notwithstanding his Certificate.

The Solicitor General shewed Cause.

Lord Chief Justice GIBBS.—This Question was agitated in the Case *Ex parte Charles* (b), where the Court of King's Bench decided that a Plaintiff having recovered Damages against a Defendant, who, between Verdict and Judgment, committed an Act of Bankruptcy, the

(a) 1 B. and P. 124.

(b) 14 East, 197. Vol. I. 372.

Debt

1814.  
WALKER v.  
BARNES.

Debt due upon the Judgment was not a good petitioning Creditor's Debt. The *King's Bench* acted with great Deliberation in that Case; because, by their Judgment, the former Decisions were overturned. It is impossible to distinguish the two Cases. We should not alter our Opinions merely in Compliance with the Decision of another Court, without considering the Reasons on which that Decision was founded: and I think that the Case, *Ex parte Charles*, was decided more according to Reason than the previous Decision. It is true that the Defendant was entitled to tax his Costs, by Virtue of the Verdict which was found for him; but those Costs did not become a Debt due from the Plaintiff to him till the Judgment was entered up, by which the Defendant was entitled to recover them. One cannot try the Question better than by asking whether an Action could have been brought before Judgment was signed.

Mr. Justice HEATH.—*Ex parte Charles* was decided on the true Grounds. In *Watts v. Hart* the Court gave Judgment contrary to their own Inclination, considering themselves bound by the previous Decisions.

Mr. Justice CHAMBERE and Mr. Justice DALLAS concurred.

Rule discharged.

Tuesday, Nov. 22,  
1814.

DOE, on the DEMISE of CHEERE and OTHERS, v. SMITH.

1 Marshall, 359, 368.

A. grants a Lease to B., which contains a Covenant that B., his Executors or Administrators, without mentioning "Assigns," should not under-let without the Consent of the Lessor. B. becomes bankrupt, and his Assignees assign the Premises to C. B. obtains his Certificate, and C. re-assigns the Premises to him; after which he under-lets them to another Person.—Held, that B. having been discharged at the Time of his Bankruptcy, from all Covenants in the Lease, by Stat. 49 Geo. III. c. 121. s. 19, the Under-letting by him, which was in the Character of Assignee, was no Forfeiture of the Lease.

**E**JECTMENT, to recover Possession of certain Premises, held under an Indenture of Lease, from Sir William Cheere to John Rogers, for the Term of 21 Years; which Lease contained a Proviso for Re-entry, on Breach of any of the Covenants to be performed on Behalf of the said John Rogers; and also containing, amongst others, a Covenant, "that the said John Rogers, his Executors or Administrators, should not, during the said Term, grant, demise, let, assign, or set over that Indenture of Lease, or the Premises thereby demised, or grant any Under-Lease thereof to any Person whatever, without the Consent of the said Sir William Cheere, his Heirs or Assigns." In the Year 1810, Rogers the Lessee became bankrupt; and the Assignees

under

under that Commission assigned the Premises in Question to *John Palmer*, the Father-in-law of *Rogers*. The latter still kept Possession of the Premises, and continued to pay the Rent to the Plaintiffs; and, as soon as he had obtained his Certificate, *Palmer* re-assigned the Premises to him. By an Agreement, dated 2d of December 1813, *Rogers* agreed with the Defendant *Smith*, to let the Premises to him for the Term of three Years; and the present Action was brought for a Breach of the Covenant above stated. *Smith* was only the nominal Defendant, being indemnified by *Rogers*. The Jury found a Verdict for the Lessors of the Plaintiff.

1814.  
DOE, on the Demise  
of CHEERE and  
Others, v. SMITH.

Mr. Serjeant *Best* moved for a Rule to shew Cause why the Verdict should not be set aside, and a Nonsuit entered.

A Rule *Nisi* was accordingly granted; and, on a subsequent Day, the Chief Justice mentioned the Statute, 49 Geo. III. c. 121. s. 19 (a), which he considered as putting an End to the Question: for as by that Clause the Bankrupt was discharged from all the Covenants contained in the Lease, no Action could be sustained against him for the Breach of them. If the Plaintiffs had declared against him as Lessee, he would have pleaded his Bankruptcy; if as Assignee, the Statute interfered. However, upon this Day,

Mr. Serjeant *Len* shewed Cause against the Rule. He admitted that the Statute, which had been referred to, presented a Difficulty. If the Assignees under the Commission had assigned to a Stranger, he would not have been subject to the Covenant: but with Regard to *Rogers*, it was sufficient that he had got the Estate again. He was not charged as Assignee: but as the Person who had entered into this personal Covenant, which neither regarded his Character of Lessee or of Assignee, and from which he was not released by any Thing that occurred.

Lord Chief Justice *Gibbs*.—I should have had some Difficulty in deciding the original Question, without the Intervention of the Statute; because, though the Covenant could not affect an Assignee, *quâ* Assignee, yet as *Rogers* did assign over to a third Person, I should have doubted whether that would not have been within the Terms of the original Agreement, even though he himself took as Assignee.

(a) By that Section it is enacted, " That " not be liable to pay the Rent accru-  
" where a Bankrupt shall be entitled to " ing due after such Acceptance, nor to  
" any Lease or Agreement for a Lease, " be in any Manner sued, by Reason of any  
" and the Assignees shall accept the same, " subsequent Non-observance, or Non-per-  
" and the Benefit therefrom, as Part of the " formance of the Conditions, Covenants,  
" Bankrupt's Estate, the Bankrupt shall " or Agreements therein contained."

But

1814.

DOE, on the Demise  
of CHEERE and  
Others, v. SMITH.

But there can be no Forfeiture, unless there be a Breach of Covenant; and if the Covenant be at an End it cannot be broken. The Statute, therefore, having put an End to the Covenant, there can be no Forfeiture. It is very true, as stated by my Brother *Lens*, that the Covenant could only be broken by *Rogers'* being actually in Possession of the Estate; but the Question is, whether by the extensive Words of the nineteenth Clause all the Covenants were not put an End to, ~~that~~ being an express Discharge of the Lessee from all the Covenants in the Lease, after the Assignees had taken it: no Action, therefore, could be supported on the Lease, after the Assignees had so taken it.

Mr. Justice HEATH, Mr. Justice CHAMBER, and Mr. Justice DALLAS concurred.

Rule absolute.

Wednesday, June 1,  
1814.

STOCKFLETH against DE TASTET and OTHERS.

4 Campbell, 10. 12.

Although a Person has been improperly examined before Commissioners of Bankrupt, upon a Subject unconnected with the Interest of the Bankrupt's Estate, with a View to procure Evidence in an Action depending against him, the Examination may be used as Evidence by the Plaintiff at the Trial of the Action, and the Judge at *Nisi Prius* cannot inquire into the Abuse of the Authority of the great Seal, by which the Examination was obtained.

The Remedy of a Party, so improperly examined, is by an Application to the Lord Chancellor to have the Examination taken off the File and cancelled.

**A**SSUMPSIT. The Plaintiff offered in Evidence the Examination of Mr. *De Tastet*, one of the Defendants, under a Commission of Bankrupt, against certain Persons who traded under the Firm of *Houghton and Co.* It did not appear that the Estate of *Houghton and Co.* was interested in the subject Matter of the Action; but the Attorney of the present Plaintiff was Solicitor to the Commission, and Mr. *De Tastet* was examined before the Commissioners, after the Action was commenced. Leave had not been obtained from the Lord Chancellor, or from the Commissioners, to make Use of the Examination upon the present Occasion.

*Scarlett*, for the Defendants, contended that the Examination could not be read in Evidence. The Bankrupt's Estate having no Interest in the Dispute between these Parties, it was a gross Perversion of the Authority given by the Statutes to examine Mr. *De Tastet* before the Commissioners. The Solicitor to the Commission was guilty of a Breach of Trust in now producing it, without the Sanction of the Lord Chancellor or the Commissioners; and the Court would not suffer the Examination to be thus fraudulently read in Evidence.

Lord

**Lord ELLENBOROUGH.**—What you state may be very good Ground applying to the Lord Chancellor to have this Examination taken off the File of the Proceedings, under the Commission, or to punish those who have abused the Authority of the Great Seal. I cannot refuse to receive in Evidence an Examination signed by one of the Defendants, however it may have been obtained. If he was imposed upon when he signed it, or was under *duress*, he will not be bound by it; but I do not here consider whether he was properly or improperly summoned before the Commissioners, or whether the Solicitor acts justifiably or unjustifiably in producing the Document to support an Action, in which the Assignees of the Bankrupts do not appear to have any interest. What is proved to have been written or signed by any of the Defendants I must admit as Evidence against them, without considering how it was obtained.

The Examination was read.

*Vide Smith v. Beadnell, 1 Camp. 80. Leggett v. Tollervey, 14 East, 302.*

DOWDEN against FOWLE, Esq.

4 Campbell, 38, 39.

Saturday, July 2,  
1814.

**THIS** was an Action against the Sheriff of *Wiltshire*, for a false Return to a Writ of *Fi. fa.* The Question was, whether a Commission of Bankrupt against *Matcham*, whose Goods were to be taken in Execution, was valid. This depended upon the petitioning Creditor's debt. On the Part of the Defendant, Evidence was given that when the Act of Bankruptcy was committed, and down to the Time when the Commission was sued out, the Bankrupt owed the petitioning Creditor a Balance of more than £100.

In Answer, the Plaintiff proposed to prove, that subsequently to the suing out of the Commission, there had been a Settlement of Accounts between the Bankrupt and the petitioning Creditor, and that the latter then acknowledged that the Balance due to him at the Time of the Act of Bankruptcy, and subsequently, did not exceed the Sum of £8. It was suggested that the Assignees (of whom the petitioning Creditor was one) had indemnified the Sheriff; but there was no

In an Action against the Sheriff for a false Return to a Writ of *Fi. fa.*, where the Defence rests upon the Validity of a Commission of Bankruptcy, if it appears that the Assignees are the real Parties, a Declaration by one of them, who was the petitioning Creditor, made subsequently to the suing out of the Commission, that the Bankrupt did

not owe him 100*l.* is admissible Evidence on the Part of the Plaintiff.

direct

1814.  
STOCKFLETH  
against DE TASTET  
and Others.



1814.  
 ~~~~~  
 DOWDEN against  
 FOWLE, Esq.

direct Proof of that Fact. However, it appeared that the Instructions for the Defence had come from the Assignees.

*Marryatt*, for the Defendant, contended that nothing which the petitioning Creditor had done or said, subsequently to the Commission, could be Evidence against the Sheriff. The most injurious Consequences to third Persons would follow, if the petitioning Creditor could upset the Commission by a simple Declaration, made after he had sworn to the Existence of the Debt.

DAMPIER, J.—The Assignees appearing to be the real Parties to this Action, I think the subsequent Declaration of the petitioning Creditor is receivable. Although he once swore to the Existence of Debt of £100, upon a further Investigation of the Accounts he might have found he was mistaken. Unfortunately Commissions are often found invalid upon Mistakes of this Nature.

The Evidence was received.

Wednesday, March 1,  
 1815.

STEVENS against JACKSON and ANOTHER.

4 Campbell, 164, 165.

A Person is liable as Acceptor of a Bill of Exchange which was drawn while he was an Infant, but was accepted by him after he came of Age.

A Trader, on being arrested for Debt, is sick in Bed, and so ill that he cannot be removed to Gaol without endangering his Life: He is therefore allowed to remain some Time in his own House, and then carried to Gaol, where he remains till the Expiration of two Months from the Date of his first Arrest. Held that this was a sufficient lying in Prison, under 21 Jac. 1. c. 19, s. 2, to constitute an Act of Bankruptcy.

THIS was an Action by a Bankrupt against his Assignees, to try the Validity of his Commission; 1st, on the Ground that there was no good petitioning Creditor's Debt; and 2dly, that he had not committed an Act of Bankruptcy.

1st. The Plaintiff had accepted a Bill of Exchange for £150, payable to the petitioning Creditors. He was an Infant when the Bill was drawn, but he had attained his full Age before he accepted it.

GIBBS, C. J. held that the Acceptance was binding upon him, and constituted a good petitioning Creditor's Debt.

2dly. On the 27th August, 1814, a Sheriff's Officer, to whom a Warrant was directed under a Writ against the Plaintiff, went to his House to

arrest

it him. He was then sick in Bed, and could not be removed out endangering his Life. The Officer made the Caption; but ved him to remain in his own House till he was sufficiently reco- l to be carried to Prison. He was then removed to Prison, and ined there till the 28th of October.

1815.  
STEVENS against  
JACKSON and  
Another.

IBBS, C. J. held, that this was a sufficient lying in Prison two ths after the Arrest to constitute an Act of Bankruptcy, within ac. I. c. 19. s. 2 (a).

Verdict for the Defendants (b).

Upon this Point, the *Solicitor General* : following Term moved, " that the ict should be set aside, and a new granted. He said it was not sufficient here had been a legal Arrest; there id be a continued and legal Custody, ler to constitute an Act of Bankrupt- *Benton v. Sutton*. 1 *Bos. and Pul.* 24. rd Chief Justice *Gibbs*.—Unless by the l Prison the Act meant the County , and that nothing but a public Prison satisfy the Intention of the Legis- ; he never was out of legal Custody.

Mr. Justice *Heath*.—Where a Prisoner is taken in Execution, the Officer is only bound to carry him to Prison within rea- sonable Time.

Rule refused.

1 *Marshall's Reports*, 469. 471.

(b) But if a Trader, on being arrested, is allowed to go at large, and then returns to Custody, the Act of Bankruptcy has Re- ference only to the latter Event. *Barnard v. Palmer*, 1 *Camp.* 509. *Vide Ross v. Green*, 1 *Burr.* 487. *Came v. Colman*, 1 *Salk.* 100. *Tribe v. Webber*, *Bull. N. P.* 23.]

BLUCK v. THORNE and ANOTHER.

Friday, May 10,  
1818.

4 *Campbell*, 191. 193.

HIS was an Action by a Bankrupt against his Assignees, to try the Validity of the Commission. A Notice was given, under Sir S. *illy's* Act, to dispute the Act of Bankruptcy only.

se Defendants' Counsel produced the Proceedings under the mission, from which they read the Depositions, to prove the ing and petitioning Creditor's Debt. They then called a Witness establish the Act of Bankruptcy, who had been examined before the ommissioners.

arrow, A. G. for the Plaintiff, claimed the Privilege to inspect this

the Residue of the Proceedings are not to be considered in Evidence, and the Plaintiff's Counsel has no Right to inspect them.

In an Action by a Bankrupt against his Assignees, to try the Validity of the Commission, where Notice being given only to dispute the Act of Bankruptcy, the De- fendants read the two Depositions, on the File of the Proceed- ings, which prove the trading and petition- ing Creditor's Debt,

Witness's

1815.  
BLUCK v. THORNE  
and Another.

Witness's Deposition, on the File of the Proceedings, for the Purpose of cross-examining him. 1st, As the Proceedings were Documents of a public Nature: and 2dly, as the Whole must be considered to be in Evidence, a Part having been read to support the Defendant's Case.

Lord ELLENBOROUGH.—The Proceedings are kept for the Benefit of the Creditors; and I know of no Right to inspect them as public Documents. Nor can I consider the Whole as being in Evidence, because two Depositions have been read. These might have been taken off the File and read separately; in which Case it could not be pretended that all the Rest of the Proceedings would have been in Evidence; and it can make no Difference that the two Depositions, when they were read, for the Sake of Convenience were suffered to remain on the File. The Right claimed is at present inadmissible. The Plaintiff may by and by call for the Deposition, if he pleases, and read it in Evidence, for the Purpose of contradicting the Witness.

The Plaintiff was nonsuited.

Saturday, May 20,  
1815.

SADLER, Assignee of KNIGHT, a Bankrupt, v. LEIGH and  
ANOTHER.

4 Campbell, 195. 198.

A Factor, who sells Goods in his own Name, without a *del credere* Commission, is a good petitioning Creditor against the Purchaser, although he has merely communicated the Name of a Purchaser to his Principal; but he ceases to be so, when the Principal has agreed with him to consider the Purchaser as his Debtor, and has taken Steps for recovering the Debt directly from the Purchaser.

**T**ROVER for the Effects of the Bankrupt taken under a *F. fa.*  
The first Question was upon the petitioning Creditor's Debt.

The Commission was sued out on the Petition of Sadler, the Plaintiff. He was a Bacon Factor; and one Harrison sent him a Quantity of Bacon, to be sold by him on Harrison's Account. This Bacon, to the Value of above £100, he sold to Knight the Bankrupt, mentioning his own Name alone, as the Seller, in the Invoice. He afterwards rendered Account Sales of the Bacon to Harrison, in which he mentioned the Name of Knight as the Purchaser. According to the Mode of Dealing between Sadler and Harrison, the latter drew upon the former, from Time to Time, for the Proceeds of the Bacon sold. Harrison had not been paid for any Part of the Parcel in Question, either by Sadler or by Knight. Sadler did not guarantee the Solvency of the Purchasers.

Park,

rk, for the Defendant, contended that *Sadler* was not a good petitioning Creditor. No Debt was due from the Bankrupt to him. The Name of the Purchaser was mentioned to the Principal, Functions of the Factor had ceased. There being no *del credere* Antee, the Loss, on the Purchaser's Insolvency, was the Loss of Principal.

1815.  
SADLER, Assignee  
of KNIGHT, a Bank-  
rupt, v. LEIGH and  
Another.

rd ELLENBOROUGH.—I think *Sadler* was a good petitioning Creditor. He sold the Goods in his own Name, and he alone was known Knight, the Purchaser, throughout the whole Transaction. He it, therefore, have maintained an Action against *Knight*, for Goods and delivered, to recover the Price. Thus, having a legal Debt to him, it follows that he may sue out a Commission of Bankrupt against the Debtor.

was afterwards proved, however, that before the Commission was out there had been a Communication upon the Subject between *Knigh* and *Sadler*, when the former agreed to consider *Knight* as his Debtor, and took Steps for recovering the Debt directly from him.

rd ELLENBOROUGH.—This last Fact, I think, is fatal to the petitioning Creditor's Debt. After the Intervention of the Principal, the Debt of the Factor to sue was gone. The Debt was then due to the Principal, in the same Manner as if the Sale had been made personally to him in the first Instance.

Although his Lordship said he had no Doubt upon the Point, he refused to reserve it, as it went to upset the Commission (a).

Upon the Merits, it appeared that the Sheriff seized the Goods under the *Fi. fa.* on the 3d of November, at Five o'Clock in the Afternoon, that the Bankrupt committed an Act of Bankruptcy, by being declared to a Creditor at Seven the same Evening.

Where Goods are seized under a *Fi. fa.* the same Day that the Party commits an Act of Bankruptcy, it is open to inquire at what Time of the Day the Goods were seized, and the Act of Bankruptcy was committed; and the Validity of the Execution depends upon the Priority.

rd ELLENBOROUGH held, that under these Circumstances, where Execution and Act of Bankruptcy were on the same Day, it was not to inquire which had the Priority (b); and that in this Case, if no Act of Bankruptcy was proved before Five, the Action could not be maintained.

The Jury found for the Defendants.

- ) *Vide Drinkwater v. Goodwin, Comp.* the Commission are on the same Day, the  
*Favens v. Bennett, 11 East, 36. At-* Priority of the Act of Bankruptcy has  
*v. Amber, 2 Esp. Rep. 493.* been established upon the Action of the  
 ) So where the Act of Bankruptcy and Day. *Ex parte Dupens, Vol. I. 323.*

READ

Tuesday, June 21,  
1814.

READ against SOWERBY.

3 Maule and Selwyn, 78. 81.

The proving a Debt under a Commission is an Election by the Creditors within the Statute 49 Geo. III. c. 121, s. 14, which deprives him of his Remedy by Action against the Bankrupt, in the Cases excepted in Statute 5 Geo. II. c. 30, s. 9.

**A**SSUMPSIT. Pleas, *non-assumpsit*, and Bankruptcy, and thirdly, that after the passing of the 49th Geo. III. c. 121, and after the making the Promises in the Declaration, and after the Causes of Action therein specified had accrued, the Defendant became bankrupt; and that the Plaintiff, before the exhibiting his Bill, proved under the Commission the said Causes of Action, as and for a Debt due to him from the Defendant, and did thereby make his Election to take the Benefit of the said Commission, with respect to the Debt so proved. Replications to the first and second Pleas *similiter*; and to the last, admitting that the Causes of Action accrued before the Bankruptcy, that before the Defendant became bankrupt he compounded with his Creditors, and that the Estate of the Defendant hath not produced, nor will produce, sufficient to pay 15*l.* in the Pound.

Rejoinder, that after the Defendant had compounded with his Creditors, and before he became bankrupt, he paid all his Creditors with whom he compounded the full Amount of their Debts.

Demurrer and Joinder.

*Holroyd*, in support of the Demurrer, contended that the Joinder was ill; the Case fell directly within the Statute 5 Geo. II. c. 30, s. 9, "*shall have compounded with his Creditors*" without any Distinction whether those Creditors shall afterwards be satisfied or not, and it is within the Mischief of the Act, because the Bankrupt has had the Benefit, for a Time at least, of a Composition, and the Creditors have sustained a Damage by the Delay. *Thornton v. Dallas* (a). *Philpot v. Corden* (b). *Haviland v. Corke* (c). *Jeffs v. Ballard* (d). Also the Replication is a good Answer to the Plea, because the proving a Debt under a Commission, against a Person who has before compounded with his Creditors, shall not be deemed an Election within the Statute 49 Geo. III. c. 121. s. 14, so as to deprive the Creditor of his Remedy against the future Effects, unless the Bankrupt's Estate shall produce 15*l.* in the Pound. The 49th Geo. III. c. 121. s. 14. was not

(a) *Doug.* 40.

(b) 5 T. R. 287.

(c) *Ibid.* 288.

(d) B. and P. 467. See also *Cowley v. Morley*, ante, 119.

intended

intended to repeal the former Statute (5 Geo. II.), or to deprive the Creditor of the Benefit thus saved to him, but only to make his proving under a Commission an Election to take the Benefit of such Commission, so far as to forego his Right of Action against the Bankrupt at the common Law.

1814.  
~  
READ against  
SOWERBY.

Lord ELLENBOROUGH, C. J.—If the Act so meant, *quod voluit non dixit*. The Act is introductory of a new State of Things, arising out of the Creditor's proving his Debt under the Commission: it shall be deemed an Election by him to take the Benefit of such Commission, with Respect to the Debt so proved. Election, here, imports that he renounces his other Rights for the Sake of that which he elects.

LE BLANC, J. DANFIER, J. concurred.

*Per Curiam,*

Judgment for the Defendant.

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MEAD against BRAHAM.

3 *Moule and Selwyn*, 91. 93.

Tuesday, June 22,  
1814.

**A** RULE Nisi was obtained for discharging the Defendant out of Custody, on filing common Bail, upon an Affidavit which stated, that the Defendant, in August 1812, being indebted in £1500 to the Plaintiff, accepted three Bills of Exchange of £500 each, drawn on him by the Plaintiff to his own Order. In April 1813 the Defendant became bankrupt, and a Commission issued against him, and the Holders of the Bills proved the same under the Commission, in the Presence of the Plaintiff.

The Drawer of a Bill of Exchange, who has paid the Amount to the Holder after a Commission of Bankruptcy issued against the Acceptor, may sue the Acceptor before he has obtained his Certificate, and arrest him upon the Bill, notwithstanding the Holder has proved the Bill under the Commission.

That since the Bills were so proved, the Plaintiff had, as Drawer, brought an Action on them against the Defendant, and held him in Custody for £1500 upon an Affidavit that the Defendant was justly and truly indebted to the Plaintiff in £1500, as the Acceptor of three several Bills of Exchange for £500 each, (setting out the Bills which were payable at a Time then past, and before the Time of the Bankruptcy.) The Affidavit of the Plaintiff in Answer, stated that in March 1814, the Plaintiff paid the Amount of the Bills to the then Holders, two of whom were the same who proved under the Commission; that he never concurred in the Commission, but on the contrary

VOL. II.

U

WAS

1814.  
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 MEAD  
 against  
 BRAHAM.

was engaged, with other Creditors, in a Petition to supersede it; that he had obtained the Consent of the Parties, who had proved the Bills, that their Proof should be expunged, of which he had given the Defendant Notice.

*Marryat* shewed Cause, and contended that the Plaintiff was remitted to his original Right upon the Bills, as soon as he was compelled to pay their Amount to the Holders. He referred to *Young v. Hunter* (a).

*Abbott, contra*, insisted that by Statute 49 Geo. III. c. 121, s. 8, the Plaintiff stood in the Place of the Creditors who had proved, and became entitled to the Dividends under such Proof; and therefore by s. 14. it was not competent to him to maintain any Action against the Defendant. The Defendant, if he had obtained his Certificate, would have been discharged of this Action by s. 8; why should not the Proof also be deemed an Election within the Statute?

Lord ELLENBOROUGH, C. J. inquired if there were any Words in the Statute compulsory upon a Party who pays the Debts, for which the Bankrupt is liable, to come in under the Commission, for if not, the proving under the Commission could only be deemed an Election, so far as it personally regarded the Creditor who proved, but not to affect the Right of third Persons. And DAMPIER, J. added, it would be hard to deprive the Plaintiff of the Chance of recovering against the Bankrupt before he has obtained his Certificate, because in the Event of his obtaining it the Bankrupt would be discharged.

*Per Curiam*,

Rule discharged.

(a) *Ante*, p. 91.

# CASES

IN

## BANKRUPTCY, &c.

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**CHARLES SELKRIG**, Accomptant in *Edinburgh*,  
 Trustee for the Creditors of **THOMAS** and **ADAM**  
**FAIRHOLMES**, late Bankers in *Edinburgh*, Ap-  
 pellant :

In the House

**WILLIAM DAVIS**, and **JOHN STEVENSON** of **LORDS** (a).  
**WILLIAM DAVIS**, Assignees under the Commission of Bank- *March, 1814.*  
 ruptcy issued against **SAMUEL GARBETT**, Mer-  
 chant in *Birmingham*, Respondents :

IN the Year 1750, *Samuel Garbett*, a Native of *England*, and a Trader at *Birmingham*, came to *Scotland*, and there entered into a Variety of trading Con-

A Commis-  
 sion of Bank-  
 rupt vests in  
 the Assign-

nees under it, all the personal or moveable Property of the Bankrupt, precluding Creditors in *Scotland*, where the Bankrupt had also resided and traded, from attaching, by legal Process, the personal or moveable Property of the Bankrupt in that Country, or from administering it in a Course of Distribution under a Sequestration.

But the Commission does not affect the heritable or real Property of the Bankrupt out of *England*, nor is there any legal Obligation on him to convey it to his Assignees, farther than what the Creditors are indirectly enabled to enforce, by the Power which they have of granting or withholding his Certificate.

The Title of the Assignees by Assignment under a Commission of Bankrupt, does not, like an Assignment by an Individual, or upon particular Contract, require Intimation : being recognized as a Transfer of a public Nature, taking Effect by Operation of Law as a Transfer by Marriage.

*Semble*, that to complete a Title by Assignment, it is not necessary that the Intimation should be notarial or formal. Ordinary Notice, or Circumstances of Conduct from which a Claim under the Assignment is to be inferred, considered as equivalent to solemn Intimation.

) To the Kindness of Mr. Counsel for the Respondents  
 n, who was one of the upon this Appeal, the Re-  
 ol. II. X porter



1814.  
 SELKRIG  
 v.  
 DAVIS.

cerus of the most extensive and important Nature. He established a Manufacture of Vitriol and Aquafortis at the Village of *Preston Pans* in the Neighbourhood of *Edinburgh*: he, in Conjunction with others, founded at *Carron* considerable Iron-works, an Establishment afterwards known as the *Carron Company*: and during Part of the Time, he was also engaged in a Shipping Company at *Carron*, in Partnership with *Francis Garbett* his Son, and *Charles Gascoyne* his Son-in-law, under the Firm of *Francis Garbett and Co.* Carrying on these Branches of Trade in *Scotland*, he continued also his Business at *Birmingham*, and from Time to Time was occasionally in *England* and in *Scotland*, having Places of mercantile Establishment and domestic Residence in both Countries. From the Year 1772 however, he was resident in *England*.

In 1782, he became a Bankrupt (a), but previously to his Bankruptcy the following Occurrences had taken Place.

In June 1770, *Samuel Garbett*, in Conjunction with his Son *Francis*, and his Son-in law *Charles Gascoyne*,

porter is indebted for the The Case is correctly reported by Mr. Dow, 2 Vol. 231.2 Rose 97. Its Importance as a Precedent in the Branch of Law to which these Cases are confined, has induced the learned Judge on affirming Reporter to give a Note more detailed than the general Nature of Mr. Dow's Work presented to the Profession. would have admitted.

(a) Upon his Bankruptcy, his Property was stated thus :

|                                |           |    |    |
|--------------------------------|-----------|----|----|
| Stock in <i>Carron Company</i> | £37655    | 17 | 9  |
| Effects at <i>Preston Pans</i> | 33476     | 15 | 0  |
|                                | <hr/>     |    |    |
|                                | 71132     | 12 | 9  |
| Effects in <i>England</i>      | 28451     | 0  | 7½ |
|                                | <hr/>     |    |    |
|                                | 99583     | 13 | 4½ |
|                                | purchased |    |    |

purchased of *Ludovick Grant* (a), the then Trustee for the Creditors of *Adam* and *Thomas Fairholmes*, certain Shares of *Carron* Stock, at the Sum of £22,951 5s.; and they in Payment gave their joint and several Bond in the Scotch Form (b), obliging themselves, conjunctly and severally, their Heirs, &c. personally to pay that Sum at the Time and in Manner therein mentioned. The Bond contained an Obligation by *Francis Garbett* and *Charles Gascoyne*, to infest Mr. *Grant* in further Security.

1814.  
SELKRIG  
v.  
DAVIS.

In 1772, *Charles Gascoyne* and *Francis Garbett* became Bankrupts, and their Estates were sequestrated. *William Anderson* was appointed Trustee for the Creditors.

The Obligors being unable to pay the first Instalment, *Grant*, on the 21st of *December* 1773, recorded the Bond, raised Letters of Horning on it, and on the Warrant therein contained arrested (c) in the Hands of *Carron* Company, all Stock Share and Interest in the *Carron* Company of and belonging to *Samuel* and *Francis Garbett* and *Charles Gascoyne*, or either of them.

(a) *Samuel Garbett* had no Interest in the Subject of the Purchase, but joined merely in Security for the Payment. The Arrestment gives the

(b) In this Bond Mr. *S. Garbett* was described as of *Birmingham*. The Arrestment gives the

(c) Arrestment is an ordinary Process, by which a Creditor enjoins a third Person from paying a Debt, or performing a personal Obligation to the Debtor of the arresting

Creditor, till the Debt, which is the Subject of the Arrestment, be paid or secured. The Arrestment gives the Creditor a Lien on, or inchoate Interest in, the Property arrested; to be completed by forthcoming. Foreign Attachment, by the Custom of *London*, or "*pone per vos*" in the Court of *Durham*, bear some Resemblance to it.

1814.  
 SELKIRK  
 v.  
 DAVIS.

This preliminary Diligence of Arrestment however, was not followed by a forthcoming; the Effect of which would have been to vest the Property arrested absolutely in the Arrester. Terms of Accommodation were proposed by *Gascoyne* and *Francis Garbett*, and accepted by *Grant*.

The Terms upon the Whole were, that *Fairholme's* Creditors should discharge the Arrestments, and not demand any Dividend from the Trustees of *Francis Garbett* and Company, prior to *January 1776*: that the Trustees should consent to the Assignment of £6000 *Carron* Stock to *Fairholme's* Creditors: that they should pay the Interest on the Bond regularly, and allow *Fairholme's* Creditors to rank on the Funds of *Francis Garbett* and Company, and of the individual Partners without Distinction. *Charles Gascoyne* further bound himself personally to pay £2000 in Money, and to keep down the Interest on a preferable Security over the Lands contained in the Bond, so that *Fairholme's* Creditors might have the full Advantage of it.

These Arrangements were substantially, or at least to a very considerable Extent, carried into Execution. The £6000 *Carron* Stock was assigned: some Payments were made (a): and the Arrestments, though never actually discharged, were considered as at an End. By this Arrangement, the Property in the *Carron* Company was in Effect unshackled of the Arrestment; certainly, as far as it was a direct Process in the Hands of *Grant*. It had, however, been proposed by *Anderson*, the

(a) Mr. *Gascoyne* gave Mr. *Stock*, and gave him a Power Grant Bills on the *Carron* to sell the heritable Estate Company £2000; paid In which he had not by the terest on the Debt: £550, Bond. and assigned £6000 *Carron*

Trustee

Trustee for the Creditors of *Charles Gascoyne* and *Francis Garbett*, that he should be allowed to make Use of the Arrestments, in order as he alleged, to extricate the Concerns of *Francis Garbett* and Co. from their Entanglement with those of *Samuel Garbett*; he, *Anderson*, indemnifying *Grant* from all Expenses and other Consequences of that Indulgence. This was acceded to; the Arrestments were accordingly by Deed, bearing Date the 28th *April*, 1777, made over by *Grant* to *Anderson* for that Purpose; but the Deed contained a Declaration, that *Grant* was not barred by any Thing therein contained, from resorting to judicial Proceedings, against the heritable Estates of the said *Francis Garbett* and *Charles Gascoyne*, or from otherwise effecting full Payment of the Sums remaining due on the Bond.

In the same Year 1777, the *Carron* Company found it necessary to raise certain Processes of Multiple Poinding (a) in the Court of Session against *Grant*, *Anderson*, and other Creditors of *Samuel* and *Francis Garbett* and *Charles Gascoyne*, Copartners in the *Carron* Company, and a great Deal of Procedure took Place, in the Course of which, on the 7th *December* 1778, being less than five Years from the 21st *December* 1773, *Grant's* Arrestment was produced and founded on (b).

In this State of Affairs, a Commission of Bankrupt, bearing Date *March* 2, 1782, was taken out against *Samuel Garbett* in *England*; and at the same Time, on the Application of *Samuel Garbett* himself (c) with the Con-

(a) In the Nature of a Bill litigious, or a Fund *in medio* of Interpleader. in the Court of Session.

(b) By these Processes it (c) According to the Bank- was alleged that the whole rupt Law at that Time in *Carron* Stock belonging to Force in *Scotland*. *Samuel Garbett* was rendered

1814.

SELKRIG

v.

DAVIS.

1814.  
SELKRIG  
v.  
DAVIS.

currence of his *English* Creditors) to the Court of Session, the Lord Ordinary, on the 10th of *April* 1782, pronounced an Interlocutor, whereby he sequestered the whole personal Estate belonging to the said *Samuel Garbett*, or to the said *Samuel Garbett* and Co. situate within the Jurisdiction of the Court. Under this Sequestration Trustees were appointed, one of them being also an Assignee under the Commission. The Assignees under the Commission attended Meetings of *Carron* Company; and during various Proposals and Discussions upon the Subject of *Samuel Garbett's* Interest, were recognized by the Company as his Assignees. Under the Commission against *Samuel Garbett*, *Grant* applied to prove a Debt for £26,862 18s. 8d. after deducting all partial Payments from the Estates of the other Obligants. The Commissioners rejected the Proof, but admitted a Claim to the Extent of £15,000. *Grant*, in the Affidavit of his Debt, took no Notice of the Arrestments, but stated that the Deponent had no other Security for the Debt than what he had mentioned, (being the Bond and the Agreement with *Gascoyne*), except a Decree of Adjudication obtained on the 5th of *December*, 1776, against the said *Samuel Garbett*, *Francis Garbett*, and *Charles Gascoyne* for Payment of the Sums therein specified then accruing due on the said Bond.

*Grant* died. The Appellant *Selkraig* succeeded him as Trustee, and again applied to prove under the Commission: for that Purpose he tendered an Affidavit, which after noticing the Arrestments stated, that the Trustee and Committee upon *Gascoyne's* Estate, with the Privity of the said *Samuel Garbett*, did agree, upon the said Arrestments being withdrawn, to assign certain Shares of Stock, &c. with the Exception of which he,

*Selkrig*, had no other Security for the Debt (*a*), for he was desirous of proving. The Commissioners refused the Proof, but did not expunge the Claim; *Selkrig* appealed upon Petition to the Lord Chancellor against their Refusal. Upon that Petition the Lord Chancellor ordered a Report to be made to the Court by the Commissioners, upon the Facts connected with Mr. *Selkrig's* Claim. A Report was accordingly made; but further Proceedings took Place. *Selkrig*, abandoning the Proceedings under the Commission, and becoming Chancellor, resorted to the Course stated in the

1814.  
SELKRIG  
v.  
DAVIS.

Sequestration which had issued at the Instance of *Garbett*, had never been renewed under the Act of the 23d and 33d of the King (*b*). Its Operation had

The State of the Debt expired with the former Act. He sought to prove was Under this Clause, however, was: After giving Credit, no Steps were taken in Mr. all the Dividends and *Garbett's* Sequestration. Then Payments received, the Act 1793, 33 Geo. III. c. 74. (being the Act by which the £6000 of Stock Bankruptcies in Scotland are had been assigned to now regulated) was passed, *Garbett*, he exhibited a wherein, after reciting the a of the whole Debt Omission to renew Sequestrations within the Provisions 763 3s. 1d. the Amount of the former Acts, it was ital and Interest. enacted, that " failing an

The Sequestration of the former Acts, it was Mr. *S. Garbett*, issued enacted, that " failing an the Bankrupt Acts " Application to the Court 2 Geo. III. c. 72, 20 Geo. " within Six Months after the 3. These Acts expired. " Commencement of this Act, " it shall be held and consi- 17 Statute passed in dered, that the Sequestra- 13 Geo. III. c. 18. con- tion or Trust created under a Clause for renewing " the said Act of the 12th of his questrations which had

1814.

SELKRIG

v.

DAVIS.

had consequently determined ; and, by the express Words of the last-mentioned Statute, the Funds were exposed to the Diligence of all the Creditors of the Bankrupt, prior or posterior. *Selkrig* therefore proceeded to execute (according to the Form used where a Debtor is out of *Scotland*) an Arrestment *jurisdictionis fundandæ causa* against *Samuel Garbett* ; and, upon that Process, raised an Action against him before the Court of Session, concluding for Payment of the Balance due on the above-mentioned Bonds, being £20,763 3s. 1d. of Capital, as at the 11th of *January*, 1796, with Interest from that Date. Upon the Dependence of this Action, *Selkrig* used a common Arrestment in the Hands of *Carron Company*, arrested all Stock Share or Interest, which *Samuel Garbett* might have therein, and all Debts due by the Company to him, upon the 24th *December*, 1798. The *Carron Company* raised a Process of Multiple Poinning, in which *Selkrig*, upon the Grounds already stated, claimed to be preferred upon the Fund *in medio*. The English Assignees entered an Appearance in the same Process, and contested his Claim.

After some Proceedings (*a*) before Lord *Armadales* Ordinary, his Lordship reported the Cause, on Informations, to the Court ; and Informations, with the Minutes and Answers, were accordingly lodged. The Court ordered the Parties to state the Cause in Memorials. Memorials were given in : and on advising them, their Lordships

|                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                            |
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| <p>“ his Majesty, and not renew-<br/>         “ ed under the Act of the 23d,<br/>         “ is entirely at an End ; and if<br/>         “ there be still any Part of the<br/>         “ Estate or Effects falling un-<br/>         “ der such Sequestration or<br/>         “ Trust remaining undivided,<br/>         “ the same shall be open to</p> | <p>“ the legal Diligence of any<br/>         “ Creditor of the Bankrupt,<br/>         “ prior or posterior.”<br/>         (a) The Points discussed<br/>         in those Proceedings are<br/>         principally those noticed as<br/>         the Grounds of Appeal.</p> |
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found

found that the Assignees under the English Commission were preferable upon the Fund *in medio*, and remitted to the Lord Ordinary to proceed accordingly (a).

1814.  
SELKRIG  
v.  
DAVIS.

Mr. Selkrig appealed against this Interlocutor, and prayed that it might be altered or reversed.

The Appellant contended, that, by the Law of Scotland, it was competent for a Creditor to attach by the legal Form of Arrestment, the moveable Estate Debts, or Effects of his Debtor, in the Hands of any third Party within Scotland; such Arrestment, duly executed, was effectual to secure to the Creditor using it, an absolute Preference in Competition with every other Creditor of his Debtor, unless either there were, and in this Case there clearly were not, other Arrestments prior in Date:—Assignations regularly intimated to the Holder of the Funds or Effects, also prior to the Intimation: or that a Sequestration in Terms of the Bankrupt Statutes, should have been previously awarded, or should follow within the Period specially provided by those Statutes to exclude the Preference of previous Arrestments. By Virtue of the Arrestment of 1773 the Appellant had established a preferable Title to the Fund *in medio*—there was at that Time no other Arrestment prior in Date—no Assignation intimated—no Title under the Bankrupt Law in Competition. That, supposing the Claim under this Arrestment to be nugatory,—then,

That the Estate of Samuel Garbett, in Scotland, had been put regularly under Sequestration in 1782,

(a) This Interlocutor was fore, gave in a Note, stating petitioned against, but their his Intention not to discuss Lordships in the Court of the Case farther before the Session adhered to their Opinion Court of Session. the Appellant, there-

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1814.  
 {  
 SMILKING  
 v.  
 DAVIS.

by Virtue of the Scotch Bankrupt Act of the 12 G. 3. renewed by the Act 20 G. 3. By this Sequestration, all Preferences, whether by Arrestment, Intimation, Assignment, or otherwise, were necessarily prevented. That Sequestration not having been renewed under the Act of the 23 or the Act of the 33 G. 3. fell totally to the Ground, and by the express Provision of the last of these Statutes, the Sequestration was declared to be at an End, and the whole Funds of the Bankrupt in *Scotland* were declared to be open to the Diligence of any Creditor, whether prior or posterior to the Sequestration. None of the Measures provided by the Statute had been adopted; the Case fell exactly within the Operation of the Clause. No Application was made by the Bankrupt, by the Trustee, or by any Creditor under the expired Sequestration, and the Result by the express Terms of the Act was incontrovertible.

At the Date of the Execution of the Appellant's Arrestment on the 24th *December*, 1798, no previous Arrestment had been executed by any other Creditor in the Hands of *Carron* Company, and no Assignment of the Debt due by them to *Samuel Garbett* had been previously intimated according to Law. It was not pretended that there was any other Arrestment except the former one, at the Instance of the same Parties, in 1773. There was no antecedent Assignment, except that by the Commissioners to the Assignees under the Commission in *England*; but that could not be stated as an intimated Assignment (a). It was not made for the express Purpose

(a) There had been, it was the Effect of that Transaction rather as a controverted contended on one Side and denied on the other, a previous Assignment of *Carron* Stock to certain Creditors in Trust, regularly intimated; but as the Papers involved

of

of asserting a Right in Virtue of the Assignment. It was natural that the English Assignees should make Enquiries into the Affairs of the *Carron* Stock in which they, as representing by *Samuel Garbett*, were interested; but they never could imagine that they were possessed of an Estate sequestered and conveyed to, and then actually under the Management of Trustees in *Scotland*.

1814.  
SELKRIG  
v.  
DAVIS.

The Preference thus obtained by the Appellant's Arrestment over the Funds of his Debtor, open by Virtue of the Statute already cited, to the Diligence of any Creditor, was not barred by any previous Agreement or Engagement whatever: for supposing the Arrestment in 1773 to have been in Effect discharged by the Agreements in 1774 and 1777; yet, unless the Debt had been paid, the Power of future Arrestments was not excluded. The Bond was not discharged. The Appellant was intitled to raise an Action for Payment; and upon the Dependence of his Action, to use the Diligence of Arrestment for the Security of his Debt till it could be ascertained by Decree.

Assuming, therefore, the Arrestment in 1773 to be unobjectionable, *quoad se*, the Question arose whether it was excluded by the Commission of Bankruptcy issued in *England*, resolving itself into the principal Ground of Appeal, whether *Selkraig* ought not to have been preferred to the Fund *in medio*, in Competition with the Assignees under that Commission. The Fund *in medio* was constituted of the Effects of a Scotch Trader, situate in *Scotland*. The Debt upon which the Arrestment proceeded was contracted in *Scotland* with a Scotch Creditor, and secured by a Bond in the Scotch Form.

The Argument of the Assignees is founded upon the  
Mistake

1814.

SELMERIG

v.

DAVIS.

Mistake of a legal Fiction for a Principle of Law. *Mobilia non habent situm*. They assume that a Rule admitted to regulate Cases of Succession is to govern the Distribution in Bankruptcy. That the Domicil shall regulate the Title to personal Property in Cases of Death, was recognized as a Rule of Law, at a Time when both the Law of *Scotland* and the Law of *England* notoriously stood very differently with Regard to the Effect of the Domicil upon Insolvency, from what it is represented to be at present. With what Consistency can the Respondents assert that *mobilia non habent situm*, when they have been discussing the Question by the Principles, the Authorities, the Statutes, and the Practice of the Law of *Scotland*, and in the Courts of that Country? The preliminary Question, whether the Property is to rank as moveable or not, or whether the Owner had or not a particular Domicil (a), must always be decided *in foro rei sitæ*. Does not this shew that the Proposition relied on is not a Maxim of Law, but a Fiction of Convenience? An Executor has no legal Title to Moveables in *Scotland* till he be confirmed an Executor in the Scotch Form. That *mobilia non habent situm* is at least but an Arrangement of international Convenience or Indifference; but is it either convenient or indifferent, that after a Man has contracted Debts to a great Amount, in a Country, and under the Protection and Faith of the Law of that Country, he shall withdraw his Property from the Control of its Laws and the Reach of his Creditors?

The Law of *Scotland* has for a long Period been in Favour of the Appellant's Case. The Title under an English Assignment is placed upon the same Footing as a Title derived from a private Assignment, and to gain

(a) *Voet. lib. 1. p. 4. t. 2. s. 11.—Erskine, B. 3. t. 2. s. 42.*

Priority

Priority over an Arrestment requires Intimation. The present Discussion, and the Decisions in *Strother v. Read*, 1803, are the only Interruption to a Series of Decisions uniformly repugnant to the Title of the Assignees. In 1798, when *Selkrig* had Recourse to the Arrestment, no Lawyer, as the Law of *Scotland* then stood, could have said he was not right in so doing. The Cases are as follow: Lord *Kilkerran*, Page 199; *Thorold v. Forrest*, *Morrison's Appendix*, voce *Foreign*; *Scott v. Lesley*, November 28, 1787; *Crawford v. Brown*, Faculty Collection, Vol. II.; *Davidson and Graham v. Fraser*, *ibid.* These Cases decided the important Point, that the Domicile does not regulate the Matter, and that where the Debts arrested are Scotch Debts, the Arrestors are to be preferred to the Assignees, and Mr. *Erskine*, B. 3. t. 6. s. 19. in express Terms adopts that Conclusion. The Case of *Strother v. Read*, in which the Court pronounced a Judgment preferring the Assignees, was contrary to former Decisions, and involves Circumstances distinguishing it from the present. In that Case *Edwards* and *Duplex* were Traders at *Leeds* exclusively, *Strother*, their Creditor, was an Englishman, resident in, and whose Debt had been contracted in that Country. *Strother*, subsequently to a Commission against *Edwards* and *Duplex* and the Assignment under it, executed an Arrestment in the Hands of a Merchant at *Glasgow*. The Assignees were preferred; but the Preference was over an Arrestment by an English Creditor upon an English Debt, and upon the Principle of the English Cases cited in the Sequel.

That the Law of *Scotland* has been understood in *England* to be in Conformity with the earlier Decisions which have been cited, appears from the Writers of Authority there. *Cullen's Principle of the Bankrupt Law*,

Page

1814.

SELKRIG

v.

DAVIS.

1814.  
 {  
 SELKIRK  
 v.  
 DAVIS.

Page 243; *Cooke's Bankrupt Law*, Page 320 (a). None of the Cases in *England* have gone the Length of deciding, that a foreign Creditor contracting in his own Country with a Party settled and trading there, and attaching his Debtor's Effects by the Law of that Country, shall be excluded by the Assignees under the English Commission. All the Cases in which that Question has been touched, have required as the very Principle of the whole Argument, first, That all the Parties should have been resident in *England* at the Time of contracting the Debt; and, secondly, That the Creditor attaching should be subject to the Laws of *England*. Nor is the Argument *ab inconvenienti* to be disregarded. The inconvenience of giving to an English Commission the Effect which has been contended for would be very great from the conflicting Laws of different Countries with respect to Preferences and the Rankings on particular Funds, and the other Technicalities of their different Proceedings.

But supposing that in other Circumstances, the Assignees, under an English Commission of Bankrupt would exclude even Scotch Creditors arresting for Debts contracted in *Scotland*, while the Bankrupt was a domiciled Scotch Trader, they ought not to exclude the Appellant in this Case, in Respect of the special Circumstances. The Bankrupt's Estates in *Scotland* were actually put under Sequestration by the Courts in *Scotland*, and were afterwards, by positive Statute, laid open to the Diligence of all the Bankrupt's Creditors, whether prior or posterior. There can be no Doubt that the Sequestration was, under the Laws of *Scotland*, effectual, and that the Debts and Effects which were the Object of it,

(a) *Hunter v. Potts*, 4 T. R. 182. *Sill v. Worswick*, 1 H. B. 665.

were

were vested in the Scotch Trustees. When therefore the Rights of the Trustees fell with the expired Sequestration, the Estate was left wholly unoccupied, and open to the Diligence of the Appellant. By the Act, the Effects were declared to be open to the Diligence of all Creditors, prior or posterior; but if the Assignees are to be preferred, the Clause as to posterior Creditors is useless, because under the English Commission, later Creditors could not be admitted.

For the Respondents, it was contended, that the Question upon the Effect of the Arrestment of 1773 was entirely at an End. By the Arrangement of *January 1774*, between *Grant* and *Gascoyne*, the Process was discharged. *Grant* had resorted to the specific Modes of obtaining Payment marked out by that Agreement. As the Trustee of *Fairholme's* Creditors, he had not only given up every Right to his Arrestment, but had repeatedly declared that he had done so. In the Processes of Multiple Poinding in *December 1777*, the Trustees of *Fairholme's* Creditors stated, in a judicial Minute given in by him, that he had agreed, in return for the Assignment of *Carron* Stock, to give up the Arrestment. The Arrestments themselves were produced by *Anderson* as his Interest; and in the Papers for the Creditors, and in several Memorials by *Grant*, it is stated that these Arrestments had been made over to *Anderson*, and that *Grant* had no Interest or Concern in them. In the Process in which these Statements were made, *Grant*, in Virtue of his Assignment of *Carron* Stock, obtained a Decree of Preference, which he extracted, and afterwards sold the Stock. The Affidavits under the Commission, made upon the tendering the Proof of the Debt, take no Notice of these Arrestments; and, on the Petition to the Chancellor, *Selkrig* produced a Certificate from the Signet Office, dated the 30th of *July, 1798*, that no Summons

1814.  
SELKRIG  
v.  
DAVIS.

1814.

SELKIRK

v.

DAVIS.

Summons of forthcoming had passed the Signet Office—that the Arrestments were in Fact prescribed. The Arrestment gone as to *Fairholme's* Creditors could not be suspended in the Hands of *Anderson*. An Arrestment is good for nothing unless there be a Debt to sustain it; but it could not be pretended that *Samuel Garbett* owed any Debt to *Francis Garbett* and *Charles Gascoyne*, or to *Francis Garbett* and Co. On the contrary it was not disputed that they were largely indebted to him. It was unnecessary, however, to discuss here the Effect of the Arrestment of 1773: that had been completely disposed of in the Court below. It was a Question, not of general Law, but of mere Practice in the Court of *Scotland*, which the Court here would not interfere with, unless under Circumstances much stronger than those which the Case of the Appellant presented.

The Arguments which had been successfully urged against the Injustice of allowing the Appellant to found upon the Arrestments of 1773, applied equally to the Claim of Preference attempted to be founded by the Appellant upon the Arrestment of 1798. By the Agreement of 1774, not only was the then pending Arrestment discharged, but, by the Letter and Spirit of the Transactions, the Right of Arrestment in future was excluded. The principal Question however upon the Appeal, resolved itself into the Effect of the Title under the English Commission. The Principle upon which the Respondents relied was, that the Assignment under the Commission of Bankruptcy, issued in 1782 against *Samuel Garbett*, *ipso jure*, transferred the Whole of his Property to the Assignees, for the general Benefit of his Creditors, and completely barred future Arrestments. The Operation of this Assignment could not be restricted by a Sequestration of the Bankrupt's Estates in *Scotland*, obtained upon the Petition of the Bankrupt himself, who had

had been previously divested of his Property by the Commission: or, if it could, yet when the Sequestration was extinguished, the Effect was the same as if it had never existed.

1814.  
SELKRIG  
v.  
DAVIS.

An English Commission transfers all the personal Property, be it where it may. The analogous Process of Insolvency in a foreign Country operates upon the Property here. This is not a Result of the Domicil: for Bankruptcy, here, may exist without Domicil, but of the Curtesy of international Law—of the Credit which one Country gives to the fair Administration of Justice in another. The Question is, whether Scotland is an Exception to that general Curtesy. The Cases of Strothers and of Stein established that it was not. Could it be said, that the Case of Strothers rested upon the Distinction which the Appellant had taken? If so, by what Definition can you say who is an English, or who is a Scotch Creditor? Upon the Principle of Convenience, surely the Administration of insolvent Estate, under a Commission or Sequestration, according to their Priorities, was less embarrassing than the Competition of conflicting Systems (a). The Appellant in this Case has endeavoured to avail himself of the Commission, and is estopped from impeaching it.

Putting the Title of the Assignees no higher than the Case of an ordinary Assignment of a Debtor's Interest in Property, for the Completion of which, Intimation by the Law of Scotland was necessary, even in that View of it, this was an Assignment intimated long before Arrestments were resorted to by the Appellant. That the Intimation must be by a notarial or formal Instrument, cannot be maintained in Argument; nor in Practice is it adopted. The Interference of the Assignees, as Garbett's repre-

(a) *Vide Stein's Case*, 1 Vol. 462.



1814.  
 ~~~~~  
 SELKRIG  
 v.  
 DAVIS.

sentative in the Carron Company, their Attendance at the Meetings, their Proposals and Discussions there, constituted a full and effectual Intimation.

*The Lord CHANCELLOR.*

My Lords, your Lordships know perfectly well that it is not usual to state the Reasons which induce an Affirmance of the Judgment of the Court below. In this Case, its Nature and Importance are such, that I hope your Lordships will excuse me, if I state the Reasons as they appear to me, why this Judgment ought to be affirmed. It is unnecessary to notice a great Deal of the Statement in the printed Papers laid before your Lordships. The material Facts, I think, may be stated thus: On the 21st December, 1773, Mr. Grant, the Predecessor of Mr. Selkrig the Appellant, arrested in the Hands of Carron Company, all Stock, Share, and Interest belonging to Messrs. Samuel and Francis Garbett, and Charles Gascoyne. That Arrestment led to a Treaty for the Administration of the Affairs of Mr. Garbett; in Consequence of which Treaty, a certain Sum of Money, though not all that the Fairholmes were entitled to, was received. In April, 1782, a Sequestration was taken out against Mr. Garbett's personal Estate in Scotland, under the 12 Geo. 3. c. 72. continued by the 20 Geo. 3. c. 43. In the 23 Geo. 3. c. 13. there was a Provision under which the Sequestration might be renewed if certain Steps were taken. And by the 33 Geo. 3. c. 74. there was another Provision which directed that an Application should be made to the Court by the Trustee, or in Case of his not doing so by the common Debtor, or any of the Creditors, within six Months after the passing of that Act, where the Sequestration had not been renewed under the Authority of the Act of the 23d of the King, and failing any such Application, it should be held that the Sequestration or Trust created under the said Act of the

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the 12th of His Majesty, and not renewed under the Act of the 23d, was entirely at an End : And if there be still any Part of the Estate or Effects falling under such Sequestration or Trust remaining undivided, the same shall be open to the legal Diligence of any Creditor of the Bankrupt, prior or posterior. As far as that Act of Parliament has been made the Foundation of Argument, it has been insisted, that the Sequestration was terminated ; nothing, it was said, having been done under this last Act of Parliament by the Bankrupt, the Trustee, or the Creditors, the Effects in Scotland, then outstanding, were by that Omission exposed to the legal Diligence of any Creditor prior or posterior. It is impossible, however, to put any Construction on that Act of Parliament, other than this. If there are Effects undivided under the Sequestration, such Effects shall be open to the legal Diligence of any Creditor, unless there be some Title paramount to the Sequestration ; and if so, that paramount Title could not be effected by the Terms of this Clause of the Act.

1814.  
SELKRIG  
v.  
DAVIS.

My Lords, in March 1782, Mr. Garbett became a Bankrupt, and there was the usual Assignment by the Commissioners, which obtains under the Authority of the Act in such Cases. Under that Commission an Application was made on Behalf of the Persons whom the present Appellant represents to the Commissioners in England, to be permitted to prove the Debt that was due to him. That Application was not successfully made before the Commissioners ; but a Claim was entered on the Proceedings : and I need not state to your Lordships, that a Claim being entered is a Matter of some Consequence ; because there never could be a final Dividend of the Estate, till that Claim was expunged. So long as the Claim stood, Part of the Bankrupt's Estate would be reserved to meet it.

1814.  
SELKRIG  
v.  
DAVIS.

My Lords, that Claim not being successful before the Commissioners, an Application was made to the Chancellor sitting in Bankruptcy. The Affidavit made by Mr. Selkrig to support that Application, stated that he held no other Security for the Payment of the Debt than those mentioned in his Affidavit, and there, the Arrestment of 1773 was stated to be withdrawn. In Addition to this, there was exhibited on Behalf of the Appellant in the Course of those Proceedings, a Certificate that there had been no Summons of forthcoming upon the Arrestment of 1773, from the 1st of December 1773, to the 1st of December 1779, a Period, whence generally speaking, it may be said the Arrestment had prescribed. The Appellant represents, that worn out by the long-continued Course of Proceedings in Chancery, he resolved to abandon them, and did abandon them, without having received any Thing under the Commission: that, in my Opinion, makes no Difference as to the Effect of the Proceedings he adopted. In December 1798, the Appellant again used a common Arrestment in the Hands of Carron Company, and the Competition between these Parties is, whether the Appellant under this Arrestment in 1798, or the Arrestment in 1773, is to be preferred to the Assignees under the English Commission of Bankruptcy sued out in March 1782? Your Lordships know, the Arrestment of 1773 could not be affected by the Proceedings in the Bankruptcy of 1782, supposing that Arrestment not to have been discharged. I abstain therefore from any Observation upon that Part of the Argument. I consider the Question to be, whether the Arrestment of 1798, which is posterior to the Bankruptcy, is to have any Effect on the Commission, with regard to Personalty in Scotland? I think it may very fairly be stated to your Lordships, that when the English Commission of Bankruptcy was taken out, it was the general Opinion, that in order duly to administer the Bankrupt's Estate, (however  
that

that Administration might differ as to the Distribution in England and Scotland,) it was necessary to have an English Commission and a Scottish Sequestration, if there was real or personal Property in Scotland, as well as real or personal Property in England. One cannot, I think, furnish stronger Demonstration that such was the Opinion, than the Proceedings in this very Cause exhibit.

1814.  
SILKING  
v.  
DAVIS.

My Lords, I have, for one Reason amongst others, been induced to trouble you shortly on this Subject, because, in another Case, the general Principle has been before the Court of Session in the Case of the Royal Bank of Scotland against Stein and Co. That was an Application for a Sequestration. The Assignees in that Case stated, that inasmuch as they were Assignees, they were entitled to hold the Property of the Bankrupt, and, therefore, that Sequestration, which was a Proceeding to affect the Property of the Bankrupt, would be a Sequestration that would affect them, and which the Court ought not to sanction. It appears, that in that particular Case, the Bankrupt himself had executed such Instruments, and made such Dispositions, as would pass for the Benefit of the Creditors under the English Commission, not only his personal Estate, but also his real Estate. But the Judges seem to have entertained an Opinion, that by the Bankrupt Law of England, the Bankrupt could be compelled to execute a Conveyance to his Creditors of his real and personal Estate. No Man can doubt that there is a moral Obligation imposed on the Bankrupt, to make that Conveyance: but it was argued, as if there was a legal Obligation imposed on him by the English Commission. I believe this is effected in Scotland by Force of the Sequestration, or that by certain Acts, the Bankrupt is ordered to make a Conveyance. However that may be, if the Question happens again to come under the Consideration of the Scottish Court, it will not be considered,

1814.  
  
 SELKRIG  
 v.  
 DAVIS.

considered, that according to the Effect of an English Commission of Bankruptcy, the Bankrupt can be compelled to make a Conveyance of his Estate to his Creditors. The Principles of the English Bankrupt Law are more connected with criminal than with civil Considerations. Those who have had a great Deal to do with Bankrupt Estates in this Country know, that where Persons propose to buy a real Estate belonging to a Bankrupt, they are extremely apprehensive there may be some secret Act of Bankruptcy affecting the Commission and the Title of the Assignees: And yet, that you cannot call on the Bankrupt to execute a Conveyance has been ruled over and over again. If therefore such a Judgment is to stand, merely on the Existence of a supposed Obligation, capable of being enforced by legal Process in England, it cannot I am afraid be supported.

In the Difficulties which these Questions present, there is a Necessity for the Interference of the Legislature, equally applicable as to real Estates, whether the Administration is to be made under a Scottish Sequestration on the one Hand, or under an English Commission of Bankruptcy on the other. I have heard it repeatedly stated in the Court in which I have the Honour to administer the Bankrupt Laws, that it was usual for the Creditors not to proceed against a real Estate in Scotland, according to the Forms of the Law of that Country, but for the Bankrupt to convey his real Estate there to the English Assignees, in order that it may be converted into Money for the Benefit of all the Creditors. It has very frequently happened, when a Man becomes Bankrupt, and is known to possess a real Estate in Scotland, that his Creditors say to him, " we will not talk to you on the Subject of legal Obligation, the moral Obligation on you is clear; and we have the Disposal of your Certificate: if you will not convey your real Estate, you shall remain uncertificated." Under the

the Effect of that Control, the real Estate is very frequently brought into the common Fund. But I know no Process in the Law of England, that can compulsorily effect it.

1814.  
SELKRIG  
v.  
DAVIS.

My Lords, it is a different Thing with Respect to the personal Estate. This I shall state shortly. I may leave out of the Case the Arrestment of 1773. Though, perhaps, technically it may be in Force, with Reference to this Case, it is gone for ever. It has proved beneficial to the Parties: and, if they have not received the Whole that was due to them, they have derived considerable Advantage from it. After the Affidavit of the Appellant, to which I have already adverted, in which it is stated that he had no such Security as that Arrestment, in which he treats it as being withdrawn; and after the Production of the Certificate that there was no Process of forthcoming, as Evidence that these Arrestments were prescribed, it appears to me quite impossible that he can now avail himself of it. I observe some of the Judges below are of Opinion that the Arrangement with Regard to the Arrestment of 1773, affects or applies to the Arrestment of 1798. How it affects that of 1798 is not explained; it does not appear to be now insisted on at the Bar; and therefore I shall take the Arrestment of 1798 to be a good Arrestment, subject only to the Question of Competition with the English Commission of Bankruptcy.

My Lords, it is quite impossible to say, that this Case, in whatever Way it is viewed, is not surrounded with Difficulties strongly calling for legislative Interposition. I agree with the Gentlemen at the Bar, that no Matter what the Difficulties may be, in order to get rid of them we must not legislate. We are to state what the judicial Difficulties are, arising out of the Circumstances of the

1814.

SELKRIE

v.

DAVIS.

the Case : and when we are sitting in another Capacity, to redress the Grievances of Opinions judicially given.

In whatever way a Scottish Sequestration may be enforced, the Distribution of a Bankrupt's Effects under it, is perfectly different from what it is under an English Commission of Bankruptcy. The Scottish Law cuts down all Securities that have been made or given within a certain Number of Days prior to the issuing of the Sequestration, whether they have been given *bonâ fide*, or given, as we should say, in Contemplation of Bankruptcy. On the other Hand, in our Law, though the Approximation of the Security to the Date of the Commission may be Evidence that it was given in Contemplation of Bankruptcy; yet it is but Evidence : and the Security may be perfectly good. Again, in England, a Man cannot become a Bankrupt, without committing an Act of Bankruptcy. The Commission must be founded on that Act of Bankruptcy: and there are various other Differences, applying to the Property of a Bankrupt, as administered under an English Commission, or *vice versa*, as distributed by the Rules, and according to the Forms of a Scottish Sequestration: If, my Lords, you attempt to obviate these Inconveniences by a co-existing Sequestration and Commission, the Difficulty is tenfold greater, unless the one should be used merely as the Means of assisting the Distribution of the Funds under the other. What personal Property shall belong to the one Proceeding, and what to the other Proceeding, is no ordinary Difficulty: the Counsel for the Appellant say there is no Difficulty:—That a Debt owing to the House in Scotland, wherever the Debtor lives, ought to go to the Scotch Sequestration; and, in like Manner, that the Debt owing to the House in England, wherever the Debtor lives, should go to the Commission. But the House may be constituted of Persons, of whom it may be difficult to say whether

ther a Man is a Scotchman or an Englishman. It may happen that a House is composed of Persons, some of whom reside in Scotland and some in England. I should wish to know, not only how the joint Debt due to one Firm, and the joint Debts due to the other, are to be distributed, but where separate Debts are due to each, whether the separate Debts are to be a Fund of Distribution under the English Commission, or under the Scottish Sequestration, or what is to become of them?

1814.  
SELKIRK  
v.  
DAVIS.

All these Difficulties certainly belong to this Case. But notwithstanding that, one Thing is quite clear; there is not in any Book any Dictum or Authority, that would authorize me to deny, at least in this Place, that an English Commission passes, as with Respect to the Bankrupt and his Creditors in England, the personal Property he has in Scotland or in any foreign Country. It is admitted, that the Assignment under the English Commission, as between the Bankrupt and the English and Scotch Proprietors, passes the Scotch Property and vests it in the Assignees, when the Scotch Creditors have not used legal Diligence. I think the Case was put at the Bar thus: That the Commission of Bankrupt operated so as to bring into the Fund the Scotch personal Property, provided that such personal Property was not arrested by legal Diligence in Scotland, prior to the Intimation of the Assignment in Scotland. It was therefore argued, that this was to be put on the same Footing as the Case of the Assignment of a particular Debt to a particular Individual. Now your Lordships need not be told, that by the Law of Scotland, if *B* assign a Debt which is due from *C* to *B*, a Creditor of *B* may arrest that Debt in the Hands of the Debtor, notwithstanding the Assignment, unless the Assignee has given an Intimation formally to the Person by whom the Debt is owing. That must be admitted. Upon that, it has been insisted here,  
that



1814.  
  
 SELKIRK  
 v.  
 DAVIS

that no Intimation has been given, and that this subsequent Arrestment in 1798 ought to have the Preference of the Title of the Assignees, under the Commission that was sued out in the Year 1782.

Now, my Lords, in looking at the Cases that have been stated to your Lordships from the Bar, and which are very well stated in the printed Papers on the Table, I quite agree with a very respectable Writer (*a*) in what he says respecting the Cases prior to Strother's Case : "The Determinations of the Court have exhibited a very distressing Versatility of Opinion." I speak only for myself at looking at every one of the Cases. I cannot find any one Principle or Circumstance stated to be common to them all. The Law, as it has been contended to be on the Part of the Assignees of Garbett, is stated by that Author at length: the Court were almost unanimous in this Case, except one Judge, who differed from the Rest. That is a Decision which is not to be taken simply as a Decision on the Subject before the Court, but may be taken in a Sense as confirming Judgment after Judgment since 1803, and therefore as carrying with it more Authority than would belong to the particular Case itself.

My Lords, with Respect to this Matter of Intimation, the Book cited authorizes me to say there has been an Intimation in this Case; that the Entries on the Books of the Carron Company are a sufficient Intimation. But I cannot help thinking there is a great Difference between the Assignment of a particular Debt by a particular Individual, and the Assignment of all a Man's Property for the Benefit of all his Creditors. If we were to hold in this Country, that in every Commission of Bankruptcy a particular Intimation was necessary, it would cut up the

(*a*) Bell's Bankrupt Law of Scotland.

Effect of English Commissions by the Roots; for when a Commission is taken out, the Bankrupt gives no Account of his Property to his Creditors; he has a very considerable Period after the Commission of Bankruptcy allowed him before he passes his Examination. It is admitted by the Appellant, that in Adjudication and Marriage no Intimation is necessary: a Decree of Adjudication by the Court of Session implies actual Possession, and at the same Time Publication, in the Records of the Court. Marriage, which is presumed to be known to all the World, transfers, by Force of the Law of Scotland, all the Rights of the Wife to the Husband. In these Instances the technical Form of Intimation is not necessary; and I should be very strongly inclined to hold (if it were necessary) in Analogy to the Assignment by Marriage, as mentioned by Lord Meadowbank in his Judgment in Stein's Case, that the particular Circumstance of Intimation was not necessary to an Assignment under an English Commission of Bankruptcy of Effects in Scotland. But if it were necessary, I say there was Intimation.

1814.  
SELKRIG  
v.  
DAVIS.

It was argued very powerfully, that there could be no such Thing here as Intimation; and speaking as an Individual, I do not know there was any Intimation either intended to be given or accepted, because the Sequestration was originally taken out, from the Understanding of all Parties, as I believe it was, that the Commission of Bankruptcy could not affect either the real or the personal Estate in Scotland: the Transaction shows it was taken out with the Concurrence of the English Assignees. They never intended to oppose the Sequestration. That Sequestration fell to the Ground under the Circumstances I have related to you; but I should be very glad to know when it fell to the Ground, and when Nothing was left but the English Commission, whether the intermediate Transactions, up to the Arrestment in 1798, are not Intimation enough?

1814.  
  
 SELKRIG  
 v.  
 DAVIS.

enough? But besides that, these Creditors would be bound by another Transaction. For, if you are unable to solve all the Difficulties which have been raised, and your Lordships must be very ingenious if you could solve all the Difficulties that have been stated, as to what is an English and what is a Scottish Creditor, what is an English and what a Scottish Debtor, composed of Firms partly resident in England and partly resident in Scotland; yet I think there is no Difficulty, if the Scottish Creditor thinks proper to come in under the English Commission. Then, he is to all Intents and Purposes an English Creditor.

It has been decided, that a Person cannot come in under an English Commission without bringing into the common Fund what he has received abroad. The Reason of that cannot be, merely that all the Creditors under a Commission are to be put on an equal Footing. If, my Lords, he has got Property which did not pass under the Commission before he came in, whatever Chancellors may have said on the Subject, they had no more Right to call into the common Fund, that which he had got by Law, and which was kept out of the common Fund, than any other Part of his Property. It could only be therefore because the Law did not pass the Property of the Individual coming within your Jurisdiction, that you say to him, if you claim any Thing under this Commission, you shall not hold in your Hands the Property which you have got by Force of the Law of another Country. If a Man choose to say, I will not bring into the common Fund that Sum which I have received, then let him retire. Now, with Reference to this View of the Case, a Claim has been made under this Commission, and the Claim has been admitted, and I have stated the Importance of that, in the Administration of the Effects of the Bankrupts.

On

On these Grounds the Question respecting this personal Property appears to me to depend: in the first Place, that Intimation was not necessary in such a Case. In the next Place, if I am wrong in that, then that in this particular Case Intimation was given. And, lastly, if Intimation was not given, it appears to me, that under the Circumstances of this Case, the English Commission might have been applied to, and has been applied to, and that the Appellant has thereby consented to bring in his foreign Debt under its Distribution; and that is another Ground on which this Judgment ought to be affirmed.

1814.  
SELKRIG  
v.  
DAVIS.

Is it your Lordships' Pleasure that this Judgment be affirmed?

Judgment affirmed.

The Case was argued by Mr. Adam and Mr. Leach for the Appellants.

Sir Samuel Romilly and Mr. Wetherell for the Respondents.

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*Ex parte* KNIGHT and NORTHWAY, Creditors of WILLIAM STEVENS.—In the Matter of WILLIAM STEVENS, a Bankrupt.

1815.  
LINCOLN'S  
INN HALL.  
Aug. 12.

**T**HIS Petition stated, that Stevens being a Trader, became embarrassed in his Circumstances; and several Meetings were in the Month of February and March last called, and attended by the Solicitor of Stevens, former Commission which had expired. The petitioning Creditor under the first Commission having been prevented from prosecuting his Commission by the Artifices of a Person who was desirous of covering certain Transactions between himself and the Bankrupt, by a Lapse of two Months.

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1815.  
*Ex parte*  
 KNIGHT,  
 NORTHWAY,  
 and Others,  
 Creditors of  
 WILLIAM  
 STEVENS.—  
 In the Matter  
 of WILLIAM  
 STEVENS, a  
 Bankrupt.

vens, who recommended the Petitioner Knight to sue out a Commission of Bankrupt. Knight accordingly sued out a Commission of Bankrupt against Stevens on the 9th of February last, employing the Solicitor of Stevens for that Purpose.

That Commission expired for Want of Prosecution, as the Bankrupt, with two Persons with whom he had considerable Dealings (and which Dealings, as it afterwards appeared, were subsequently to his committing more than one Act of Bankruptcy), requested the Petitioner not to proceed with the Commission, offering to secure a Composition to the Creditors. The Petitioner was recommended by the said Solicitor to accede to such Request, and was advised by him, that such Composition, if it could be effected, would be more advantageous to the Petitioner, and the other Creditors of Stevens, than proceeding in the Commission; and Negotiations and Meetings, with a View to such Composition, were kept up by such Persons until the Commission became supersedeable.

On the Supersedeas of the Commission issued by Knight, Petitioner Northway, by the Advice of the same Solicitor, and employing him for that Purpose, sued out another Commission of Bankrupt against Stevens on the 14th of *March* last, but did not proceed therewith, receiving similar Advice to that given to Knight; and further, because a Committee of the Creditors at large was formed to endeavour to negotiate a Composition and Settlement with the Bankrupt and the said two Persons before referred to, who still requested that the said Commission might not be proceeded with. In the Result, after much fruitless Negotiation and Evasion on the Part of those two Persons, the Creditors determined that a Commission of Bankrupt ought to be prosecuted; but in  
the

the mean Time the second Commission had also by Lapse become supersedable and inoperative.

The Petitioner Knight, tired of these evasive Negotiations, employed another Solicitor to sue out another Commission of Bankrupt against Stevens, which issued on the 13th of April last, and the same was prosecuted.

By the Means, and under the Circumstances aforesaid, a Lapse of upwards of two Months was obtained from the Date of any Transaction with the Bankrupt before a Commission of Bankrupt was issued and prosecuted. And the Petitioners stated their Belief, that the Interference of such Persons, and their Offer of a Composition was not made with any serious View to a Settlement with the Creditors, but merely to delay the Prosecution of a Commission until after two Months had expired, so as to give Effect to their Transactions with Stevens.

As the Ground of this Belief the Petitioners stated, that the said Persons openly rested their Objections to deliver back and account for a very considerable Part of the Bankrupt's Effects, upon the sole Ground, that more than two Months from the Date of the Commission had elapsed from the Time of their taking Possession thereof, and dealing therewith. And the Solicitor who sued out the first Commissions, was employed by, and on the Behalf of such Persons, to resist on that Ground the Claim of the Assignees under the existing Commission.

The Bankrupt's Estate was thus likely to be damaged to a very considerable Extent; and the Petitioners were desirous of putting the Affairs of the Bankrupt on the same Footing as they would have been but for the Interference of those Persons.

1815.

*Ex parte*

KNIGHT

NORTHWAY,  
and Others,  
Creditors of  
WILLIAM

STEVENS.—

In the Matter  
of WILLIAM  
STEVENS, a  
Bankrupt.

The

1815.

*Ex parte*

KNIGHT,  
NORTHWAY,  
and Others,  
Creditors of  
WILLIAM  
STEVENS.—

In the Matter  
of WILLIAM  
STEVENS, a  
Bankrupt.

The Bankrupt had not obtained his Certificate.

The Petitioners prayed, that the Writ of Supersedeas so issued on the two first Commissions of the 9th of February and the 14th of March last might be quashed, and that a Writ of Procedendo might issue for the Petitioners to be at Liberty to proceed in the Commission issued by the Petitioner Knight. And that such Commission might be ordered to be prosecuted by the Solicitor to this Petition.

Sir *Samuel Romilly* supported the Petition, on the Fraud of the Case.

*The Lord CHANCELLOR*  
Made the Order as prayed.

PRACTICE.

1815.

April.

IN the Morning of the 18th of *November*, a Clerk of Messrs. *Darke, Church, and Darke*, applied at the Bankrupt-office for a Commission of Bankrupt, and paid the Fees, and left the necessary Documents; but Business then pressing, the Clerk at the Bankrupt-office omitted to make the regular Entry of the Instructions in the Docket Book.

In about an Hour afterwards, a Clerk of Messrs. *Anstice and Cox* attended at the Bankrupt-office, in order to strike a Docket against the same Person; and finding, upon Inspection of the Docket Book, that no Entry had been made of any previous Instructions for that Purpose, intended that they had a prior Claim to the proposed Commission.

Upon this State of Facts, the Question was submitted for the Opinion of the Lord *Chancellor*, whether Messrs. *Darke, Church, and Darke*, or Messrs. *Anstice and Cox*, were, upon the Construction of the general Order of April (a) 1815, entitled to the Commission.

Upon the one Side was urged the Propriety of adhering to a Rule of Practice, established to prevent Combinations of this very Nature. That it was of little Consequence which of the two Solicitors should have the Right of a Commission.

On the other Side it was contended, that it would be odd to visit the Omission of the Clerk in the Bankruptcy (arising, it was admitted, from the Hurry of Business)

Where, from the Hurry of Business the Clerk at the Bankrupt-office omitted to make the Entry of an Application for a Docket, (according to the Directions of the general Order,) previously to the Application of another Solicitor for the same Purpose, the first Solicitor was held to be nevertheless entitled to the Commission.

(a) Vide the Order at the End of this Number.



1815.

ness) immediately to make the Entry in the Docket Book, to operate to the Hardship of an innocent Person.

*The Lord CHANCELLOR*

Adopted this View of the Question, and thought that it would be hard by a strict and technical Construction of the Order, to deprive the first Solicitor of a Priority, which, as far as depended upon himself, he had secured, and which, without his Fault, had been endangered. His Lordship intimated, that it would be an Improvement to the Order to insert a Provision, that both the Clerk of the Solicitor applying for the Docket, and the Clerk at the Bankrupt-office, should indorse, as a Memorandum upon the Documents for the Docket, the Time of their being deposited at the Bankrupt-office.

Nov. 4.

1815.

*Ex parte CROWDER.*—In the Matter of WATKINS.

A Commission, under which the Bankrupt has obtained his Certificate, not superseded on an Objection to the Trading. Or, that Debtors to the Estate,

upon that Ground, refuse to pay the Assignees; query if the Application for that Purpose were made by all the Creditors under the Commission.

**T**HIS was a Petition by some of the Creditors under the Commission, (who stated their aggregate Debts to amount to £22,000,) to supersede a Commission, under which the Bankrupt had obtained his Certificate two Years ago. The Objection now urged to the Validity of the Commission was, that the Trading, namely that of a Scrivener, upon which the Bankruptcy had been adjudged, was insufficient to maintain it: that several Debtors to the Bankrupt's Estate, aware of this Objection, had refused to pay their Debts; and the Assignees, apprehen-

sive of Nonsuit, declined to enforce Payment by Action. The Petition alleged many fraudulent Circumstances attendant upon the Issuing of the Commission, and the Proof of the Trading; but the Allegations were not sustained by Affidavit.

Mr. *Leach* and Mr. *Barber* in Support of the Application, argued strongly from the Inconvenience of sustaining a Commission, under which no Action could be maintained with Success, and which the Debtors to the Estate set at Defiance.

Sir *Samuel Romilly* and Mr. *Cooke* for the Assignees, and Mr. *Roupell* for the Bankrupt, contended that there never had been an Instance of a Commission having been superseded upon an Objection to the Trading, where the Bankrupt was in Possession of his Certificate, and where no Circumstance of Fraud could be imputed to him: that there was but one Creditor (*a*) who disputed the Payment of the Debt; and he did so, not upon any Objection to the Title of the Assignees to sue as such, but as claiming a Set-off greater than their Demand.

*The Lord CHANCELLOR.*

This is a Question of much Embarrassment. On the opening of this Petition, I considered it as proceeding on this Ground, that the Commission was in Fact the Commission of the Bankrupt, and that the Objection to the Trading was urged, not as the Ground upon which the Court should now supersede this Commission, but as a Circumstance from which I was to infer (Regard being had both to the Trading and to the Manner of getting at the Adjudication of it) that the Commission was fraudulent. In that View I thought myself bound to entertain this Application, because, if the Commission were fraudulent,

(*a*) It was admitted that there was but one Creditor.

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the

1815.

*Ex parte*  
CROWDER  
—In the  
Matter of  
WATKINS.

1815.

*Ex parte*

CROWDER.

—In the

Matter of

WATKINS.

the Bankrupt could take no derivative Enjoyment from it; but if, as it now appears, there is nothing to be urged against the Validity of this Commission, sustaining, as it does, the Enjoyment of this Certificate, but Doubts as to the Trading, the Course was obvious—the Petitioners should have filed a short Petition, praying that the Assignees might be removed, or that the Petitioners might be at Liberty to use their Names for the Purpose of enforcing these disputed Debts, indemnifying them against the Consequences of such Action.

If, on the other Hand; the Commission could be considered in no Sense as fraudulent: that the Creditors had all proved, under a common Mistake, that this Person was within the Bankrupt Laws as a Scrivener: (and here I shall observe, that upon this Deposition it would have been difficult for the Commissioners to draw any other Conclusion, inasmuch as it adopts the very Language of the Act of Parliament, descriptive of that Species of Trade): and that, from the Defect of the Commission, the Debts could not be collected; and therefore, praying upon that Ground, and upon the Circumstance of their having been drawn into the Commission in Ignorance of its Defect, that it might be superseded: that would have brought forward the neat Question, whether the Court ever did supersede a Commission under such Circumstances.

A Question so raised must depend upon its particular Circumstances; for Example, whether the Bankrupt was blameable or not. Taking it that the Commission had proceeded upon a common Mistake, Blame could only attach upon the Bankrupt in Respect of his subsequent Conduct. I should have considerable Difficulty in saying, because the Assignees from the Objection which Debtors raised to their Demands, experienced a Difficulty in collecting the Debts, or in disposing of real Estates,

states, from the Scruples which Purchasers might make of their Title, that that would be a Ground to supersede the Commission, under which the Bankrupt had obtained his Certificate. It is a material Consideration, that the Bankrupt is not compellable to join his Assignees in Conveyance of real Property (a). I never knew an Instance where the Bankrupt's Certificate has been taken from him, because there was no petitioning Creditor's Debt, no Trading, or no Act of Bankruptcy; and even if I had jurisdiction to recall it under such Circumstances, I should hesitate to exercise it in a Case, where the Bankrupt appears to have conducted himself honestly, and is ready to do every Act which can be properly required of him. But the Case merely upon the Objection of a particular Debtor, who, it is stated, refuses to pay the Amount alleged to be due from him, although he has been offered satisfactory Indemnity, both by the Release of the Bankrupt and of his Assignees. Could it be endured, that after such an Offer he should be permitted to defend himself against this Demand both in Law and Equity? or can it be urged as a Reason for superseding the Commission? Certainly not:—the same Difficulty of enforcing a Claim against a Debtor, by Reason of the Inability of the Assignees to prove the Requisites of their Commission, might be created by the Circumstance, that the Witness, upon whose Evidence those Requisites rested, was dead (b). Is the Bankrupt therefore to lose his Certificate, when no Fraud, no Impropriety, are alleged against him—and merely to remove these alleged Inconveniences? I cannot bring myself to that Conclusion; and more particularly so in this Case, where the Bankrupt is willing to give the fullest Assistance to his Assignees in obviating the Objection.

(a) *Selkrig v. Davis*, ante, p. 291.

(b) *Brickwood v. Miller*, post, p. 340.

1815.

*Ex parte*  
CROWDER.  
—In the  
Matter of  
WATKINS.

Bankrupt not  
compellable  
to join his As-  
signees in Con-  
veyances.

*Ex parte*

*Michaelmas**Term.*

1815.

*Ex parte* HOOPER.—In the Matter of HOPKINS.

A Mortgage by  
Deed cannot  
be extended  
by Parol.

The Doc-  
trine of equi-  
table Mort-  
gage produc-  
tive of Incon-  
venience, and  
not to be car-  
ried further.

ON the 6th of *April* 1811, *Hopkins* borrowed £400 of *Ford*; and as Security for Re-payment, by Deed of that Date, mortgaged to him certain Premises redeemable on the 5th of *October* following.

*Hopkins* borrowed further Sums of *Ford*. On the 13th of *June* 1811, an Account was stated between them, when it appeared that *Ford* had advanced a further Sum of £400. For this further Sum *Hopkins* agreed to execute a further Mortgage; and in the mean Time it was to be considered as tacked to, and included in, the former Security. The Interest was from Time to Time paid on both Sums.

A further Mortgage was not executed. *Ford* died; *Hopkins* became bankrupt.

The Petitioner, who was the Executor of *Ford*, prayed that the mortgaged Premises might be sold, and applied in Payment of both Sums.

Mr. *Fontblanque* and Mr. *Montagu* in Support of the Petition, cited *Ex parte Langston* (a). If the Title Deeds had been returned by *Ford* to *Hopkins*, and then re-delivered by *Hopkins* to *Ford*, that clearly would have been a Case of equitable Mortgage. Is not this Agreement, though only in Parol, equivalent to such Delivery and Re-delivery? So a Vendor of an Estate has, without any Writing, a Lien for his unpaid Purchase-money.

(a) 1 Vol. 26. *Ex parte Marsh*, 2 Vol. 239.

Mr.

Mr. *Hart contra.*

*The Lord* CHANCELLOR.

If the Petitioner feels himself so strong upon this Point as to think it worth his While to raise it on a Bill, he is at Liberty to do so: but I shall make no Order upon this Petition. It has I believe been uniformly held, that if the original Mortgage be a legal Mortgage, or constituted by Contract in Writing, it cannot be added to by Parol; and I feel little inclined to carry the Cases on equitable Mortgage farther than they have been carried at present<sup>(a)</sup>. They have been productive of much Inconvenience, and where I can find a Distinction, upon that Distinction I will rest. An Argument has been founded on the supposed Analogy to those Cases, in which a Vendor has been allowed to have a Lien upon the Estate sold for his Purchase-money. There is this Difference. In Purchase, Payment is an essential Part of the Contract. In Loan, the Contract is as complete, and the Relation of Debtor and Creditor attaches as firmly, whether there be any Security or not. A Mortgage or Security is merely an accidental Circumstance in a Transaction concluded and complete by the mere Advance of Money.

Petition dismissed.

(a) *Ex parte Shaw*, 1 Vol. p. 299.

1815.

*Ex parte*

HOOPER.

—In the  
Matter of  
HOPKINS.

*Michaelmas**Term.*

1815.

In the Matter of GOOLDIE.

Persons ordered to attend Commissioners, to prove Act of Bankruptcy, having refused Obedience to the Warrant of the Commissioners upon the Ground that they were Creditors, and therefore incompetent as Witnesses.

That a Party is a Creditor, is not a preliminary Objection to his being examined. As the Result of the Examination may establish that he is not a Creditor.

**U**PON an Application by Petition to the Lord Chancellor, that certain Persons who had been Servants of the Bankrupt, should be ordered to attend before the Commissioners, to give Evidence of an Act of Bankruptcy, it was stated, as the Ground upon which the Parties in Question considered themselves justified in refusing Obedience to the Warrant of the Commissioners, that they were Creditors of the Bankrupt, and therefore were not competent to establish by their Testimony, the Fact they were required to depose to.

*The Lord CHANCELLOR.*

The Objection which has in this Case been taken to the Competency of these Persons to be examined as Witnesses to the Act of Bankruptcy by which this Commission is to be established, namely that their Wages not being paid, they are Creditors, and therefore ought not to be compelled to give their Testimony, can only be sustained upon two Grounds. First, that the Effect of this Commission may be to oblige them to take Dividends upon their Debt, in Exclusion of their Right to enforce a Satisfaction of it by Action. To that the Answer is, that it never yet has been received as an Objection to the Testimony of a Witness, that the Effect of it may be prejudicial to his civil Rights. The next Ground is, that being Creditors, they are for that Reason incompetent to speak to an Act of Bankruptcy. That however is entirely a Question for the Discretion of the Commissioners, how they will act upon the Result of the Examination of these Parties, when it shall have been taken before them. Probably the Result of the Examination may be to establish

blish that they are not Creditors. I therefore think, that the Objection cannot be allowed, and that the Order must be made.

Sir *Samuel Romilly*, and Mr. *Heald*, in Support of the Petition.

1815.  
In the  
Matter of  
GOULDIE.

*Ex parte* MARTIN.—In the Matter of MARTIN.

1815.  
*Michaelmas*  
Term.

THIS Petition stated a Will, by which the Testator bequeathed all his personal Estate to *Pryor* and *Barley*, upon Trust to sell it, for Payment of his Debts: after the Payment of his Debts, to invest the Surplus, and to pay the Interest to his Widow *Hannah Martin* for her Life, for the Maintenance and Support of herself and her Children; and after her Death, to divide the Principal amongst all his said Children (naming them) with the Exception of his Son *Edward*, whom he stated to be provided for. But in Case his Son *Edward*, who then assisted him in his Business, should carry on the Trade, for the equal Benefit of his Mother and himself, the Testator directed, that the said *E. Pryor* and *R. Barley* should not sell the Lease of the Dwelling-house, Furniture, Plate, and China, but should permit the said *Hannah Martin* and her Children to reside in the House and to have the Use of the Furniture, &c. together with such Sum of Money, for the Purpose of carrying on the Trade, as she should think proper to employ in the

When a Testator directed that in Case his Son should carry on the Testator's Trade for the Benefit of himself and his Mother, his Lease and Furniture should not be sold, but that the Trustees should permit the Widow and Children to reside therein, and have the Use of it. And

the Widow and Son carried on the Trade, and became bankrupt.—Held, that the Furniture, &c. was not in the Order and Disposition of the Bankrupts.

Trade,



1815.

*Ex parte*  
**MARTIN.**  
 —In the  
 Matter of  
**MARTIN.**

Trade, upon his Son *Edward* joining her in giving such Security for the same as his Trustees should think proper; the Testator appointed the said *E. Pryor*, *R. Barley*, and his Wife *Hannah Martin*, joint Executrix and Executors of his Will.

The Testator died in 1811. The Business after his Death was carried on by his Widow and his Son *Edward* on the Premises, till some Time in the Year 1815, the Widow and his Son remaining in the Possession of the House, Furniture, Plate, and China; and being in such Possession, they became bankrupt.

This was a Petition by *Hannah Martin*, upon the Part of the other Children (*a*) of the Testator, praying that they might be declared to be entitled to the House, Furniture, Plate, &c. which the Assignees had possessed themselves of and were about to sell, as left in the Order and Disposition or the Bankrupt, within the Statute of James (*b*).

Sir *Samuel Romilly* and Mr. *Cooke* in Support of the Petition, contended, this was a Possession derived under the Will, and entirely dependent upon it. The Property was left, not to the Order and Disposition of the Bankrupts, but for the Accommodation of the Widow and her Family, and could not be withdrawn from their Accommodation without a Breach of Trust.

On the other Side, it was contended by Mr. *Hart* and Mr. *Montagu* for the Assignees, that this Property had been, during the Continuance of the Trade, apparent to the Creditors as Property possessed by the Bankrupts,

(*a*) *Pryor* was dead, and      (*b*) 21 Jac. 1. c. 19. s. 11.  
*Barley* had never acted.

over

over which they had the Control, and the Power ostensibly of disposing of it: it gave them a Facility of carrying on the Trade, and in Substance and Effect was comprised in the Capital of it.

*The Lord CHANCELLOR.*

The Question is, whether the Property can be considered as the general Assets of this Trade, and as such, disposable under the Bankruptcy of one of the Executors. The Testator, a Trader, devises his Effects, not to *Hannah Martin* alone, but to *E. Pryor*, and *H. Barley*, upon Trust to sell the Whole, and to lay out and invest the Produce of the Whole, and to apply the Interest and Dividends of the Whole to the Wife for Life, for the Maintenance of the Children; and after the Death of his Wife, to divide the Whole among them, exclusive of *Edward*. He then, adverting to the Circumstance of his having carried on a Trade, directs, that in Case his Son *Edward*, "whom I have provided for," (not, however, by any Provision in the former Part of the Will) "shall carry on the Trade for the equal Benefit of his Mother and himself, then, that the said Trustees shall not sell the Lease of my Dwelling-house, Furniture, Plate, and China, but shall permit my said Widow and her Children to reside in, and have the Use thereof."

By the Plan of that Will, it appears to have been the Intention of the Testator to give the Whole of that Property for the Benefit of all the Children, exclusive of *Edward*: and he, in the first Instance, in Terms indicates that Intention; but adverting to the Circumstance that that Property might be more advantageously applied in Advancement of his Object, than by the Sale of it, he directs, that in Case his Son *Edward* shall co-operate in that Object, that the Furniture shall be given to the same two Trustees, to permit, not merely *Hannah Martin*, but  
all

1815.

*Ex parte*  
**MARTIN.**  
—In the  
Matter of  
**MARTIN.**

1815.

*Ex parte*  
**MARTIN.**—In the  
Matter of  
**MARTIN.**

all the Children to have the Accommodation of it. He does not devote the Furniture to the Purposes of the Trade, as he had directed his Money to be employed in it, but qualified with a restrictive and specific Enjoyment, with Reference to which, he directs, that it shall not be converted into Money. That Alternative having been adopted, it is impossible to say that the Furniture was in the Possession of *Hannah Martin*, as her own exclusive Possession, unconnected with that of her Children. They had as good a Right to it as she had. It was a Possession connected with Title, and dependent in the Possession of the Bankrupts, upon the same Trusts as it would have been subject to, had it remained in that of the Trustees of the Testator.

*Muller v. Moss.* 99. *Thack-* v. *Gregory.* 149, *ante.*  
*waite v. Cock.* 106. *Coldwell.*

1815.

*Michaelmas*  
*Term.*

Nov. 21.

*Ex parte* **BROOK and CHATTERIS.**—In the Matter  
of **WATSON.**

Surety entitled  
to Dividends  
on the Debt  
proved by  
their satisfied  
Principal.

**I**N 1810, *Watson, Nelson, and Cook*, of Nottingham, being indebted to their Bankers, Messrs. *Wright and Co.* in £9000, prevailed upon the Petitioners to become Sureties to Messrs. *Wright and Co.*, for £3000. The Petitioners accordingly, on the 24th of September 1814, made and gave their joint promissory Note to *Watson and Co.*, for that Sum, and they indorsed it to *Wright and Co.*; and *Watson and Co.* gave to *Brook* and to *Chatteris* respectively, their promissory Notes, as counter Securities.

Subsequently to this Transaction, *Watson and Co.* reduced

duced their Debt with Messrs. *Wright* and Co. to £4600, and then stopped Payment; and on the 12th of *January* 1813, the Commission issued against them.

On the 13th of *February* 1813, *Brook* paid to Messrs. *Wright* and Co. a Bill for £1408 14s., in part Discharge of his Liability on the Note: and on the 12th of *March* following, the Sum of £91 5s. 10d., being the full Amount of the Principal and Interest for which he was responsible.

At the second Meeting under *Nelson* and Co's. Commission, *Wright* and Co. proved the full Amount of their Debt of £4600, exhibiting as Securities the joint Note of *Brook* and *Chatteris* for £3000, and the Bill for £1408 14s. 8d. received from *Brook*.

Subsequently to this, *Chatteris* gave his Note for the Payment of his Share of the joint Note, at six Months from the 14th of *December*, 1812, and *Wright* and Co. gave a Receipt for the Note as in Part of his and *Brook's* Note for £3000.

On the 30th of *May*, 1814, before the Maturity of *Chatteris's* Note of £1500, a Dividend of 8s. 9d. in the Pound was received by *Wright* on the £4600.

On the 23d *June*, 1814, *Chatteris* paid £843; making, with the Dividend received by *Wright* and Co., under the Commission against *Nelson* and Co., the Sum for which *Chatteris* was liable.

Under these Circumstances, *Brook* and *Chatteris* insisted that they were entitled to have their joint promissory Note delivered up to them, which on the other Hand, *Wright* and Co. contended they were entitled to retain,  
in

1815.

Ex parte  
BROOK and  
CHATTERIS.  
—In the  
Matter of  
WATSON.

1815.

*Ex parte*BROOK and  
CHATTERIS.—In the  
Matter of  
WATSON.

in Order completely to cover their Debt from *Nelson and Co.*

The Petition therefore prayed, that the £3000, Part of the Debt proved by *Wright and Co.* against the Estate of *Nelson and Co.* might be expunged, with Liberty for the Petitioners to prove £1500 each, and that *Wright and Co.* might pay to *Brook* the Proportion of the Dividends already received by them.

Sir *Samuel Romilly* and Mr. *Cooke* in Support of the Petition, contended, that the Prayer of it was authorised by the 49th G. 3. c. 121. s. 8. Previously to that Act, a Surety had no Remedy but derivatively, by standing in the Situation of the Principal. That Act gives him a Right to a direct Proof. To withhold from the Petitioners the Right of receiving these Dividends, was to make them become Securities for more than they had stipulated.

Mr. *Leach*, on the other Hand, contended, that Messrs. *Wright and Co.* had a Right so to use the Security, as to make it enure to their complete Indemnity.

*The Lord CHANCELLOR.*

The Inference from the Note must prevail, unless the extrinsic Evidence produced to vary it, establish the Variation clearly and satisfactorily. I think the collateral Evidence is much too slender in this Case (a). Taking the Agreement to be as the Petitioners have stated it, the Principle upon which the Relief is prayed is correct. In the Form of it it is open to this Observation,

(a) Much Correspondence were to be considered as was stated in Evidence, as Sureties for the general Bala-  
raising an Inference from lance due to *Wright and Co.*  
which *Brook and Chatteris*

that

that the promissory Note raises a joint Demand; which, with Reference to the distinct Influence it would give under the Commission, and more particularly with Reference to its Effect upon the Certificate, it will not be right to sever. The Order therefore must be, for the Petitioners to receive the future Dividends upon the £3000, *Brook* to receive from *Wright* and Co. his Proportion of what they have already received.

1815.

*Ex parte*  
*BROOK* and  
*CHATTERIS.*  
—In the  
Matter of  
*WATSON.*

*Ex parte* *SIMPSON.*—In the Matter of *ASHTON.*

1815.

*LINCOLN'S*  
*INN HALL.*  
*Dec. 21.*

*ASHTON* and *Ingham* were Partners, and possessed of joint Property to a very considerable Amount. A joint Creditor took out a separate Commission against *Ashton.*

Joint Creditors not allowed to vote in the Choice of Assignees under a separate Commission, although the petitioning Creditor, whose Debt would have carried the Choice, consented. An Application that a Trustee

This was a Petition on the Part of other joint Creditors, whose Debts amounted to £12000, for Liberty to vote in the Choice of Assignees, under the separate Commission; or, if his Lordship should not think fit to make that Order, then, that they might have Liberty to elect a proper Person as Trustee, or Inspector, on their Behalf. The petitioning Creditor, the Amount of whose Debt it was stated would carry the Choice of Assignees, made no Opposition to the Application. *Ex parte Laycock*, 1 Vol. 33. was referred to (a).

or Inspector, may be appointed to protect the Interests of a Class of Creditors, is premature, until after the Choice of the Assignees.

(a) Reported as *Ex parte Jones*, 18 Vcs. 283. *Ex parte Taylor*, *ibid.*

It

1815.

*Ex parte*

SIMPSON.

—In the

Matter of

ASHTON.

It did not appear what was the Amount of the Debts of the separate Creditors.

*The Lord CHANCELLOR*

Thought, that the Rule by which joint Creditors were excluded from voting in the Choice of Assignees under a separate Commission, ought not to be departed from. In this Case, although the petitioning Creditor's Debt might, from its Amount, govern the Choice of Assignees, yet there were separate Creditors who had a Right to vote (*a*). That, with Respect to the Alternative of the Petition, namely, that the Petitioners might be permitted to elect a Trustee, or Inspector, to attend to their Interest, the Application was premature until the Choice of Assignees had been effected. It might then probably happen, that the Person chosen was one of whom the joint Creditors might not be inclined to complain.

The Petition was ordered to stand over, with Liberty for the Petitioners to mention it again, if, after the Choice of Assignees, it should be considered necessary.

Mr. *Rose* in Support of the Petition.

Mr. *Culleh* for the petitioning Creditor.

(*a*) In *Ex parte Laycock* there was no separate Creditor entitled to vote.

*Ex parte*

1815.

*Michaelmas  
Term.*

*Ex parte* ROWE.—In the Matter of THOMAS.

A SEPARATE Commission issued against *Thomas*, directed to Commissioners at *Plymouth*, and a joint Commission subsequently issued against *Thomas* and his Partners, directed also to certain Commissioners at *Plymouth*.

The petitioning Creditor, and the acting Commissioners, were the same under both Commissions.

This was an Application on the Part of the petitioning Creditor, that the Commissioners under the joint Commission, might be at Liberty to receive an Affidavit of the Act of Bankruptcy, made before a Master extraordinary, by the Person who had deposed to the same Act of Bankruptcy under the separate Commission, and upon which the Bankruptcy had been adjudged: that Person having been obliged to quit *Plymouth* for *Bristol*, upon very pressing and important Business, which was there likely to detain him.

This Application was opposed by *Thomas*. In Support of it, the Case of *Walter Wood (a)* was relied on.

*The Lord CHANCELLOR*

Inquired, whether in the Case cited, any Opposition had been made to the Application; and being answered in the negative, refused to make the Order.

The Petition was dismissed.

(a) 1 Vol. 293.

Act of Bankruptcy not permitted to be proved by Affidavit, although the same Person had regularly proved the same Act of Bankruptcy under a prior separate Commission against the same Bankrupt, who had subsequently been included in a joint Commission against him and his Partners.



1815.

1st Nov.

## BRICKWOOD v. MILLER.

Defendant not  
to withdraw  
Rejoinder and  
give Notice of  
disputing Com-  
mission, where  
the Plaintiff's  
Witnesses to  
its Validity are  
dead.

**T**HE Plaintiffs moved to discharge an Order of the 11th of *July* 1815 (a), whereby it was ordered, that the Defendant *Miller*, should be at Liberty to withdraw the Rejoinder, and rejoin *de novo*, giving Notice of his Intention to dispute the Act of Bankruptcy of *Thomas Ibbot Pierce*, a Bankrupt, and the petitioning Creditor's Debt, according to the Stat. 49 Geo. 3. c. 121.

The Motion was made upon the Affidavit of the Plaintiffs' Solicitor: which, after stating the Proceedings in the Cause, stated, that the Act of Bankruptcy upon which the Commission issued, was proved by one *Alexander Simpson*, formerly a Clerk to the Bankrupt; and that since the Order of the 11th of *July*, the Deponent had discovered, that *Simpson* died some Years ago at *Gibraltar*; that the Deponent, in Answer to a Letter which he had, on the 3d of *August*, sent to Mr. *William Simpson* of *Aberdeen*, a near Relation of *Alexander Simpson*'s, desiring to know whether *Alexander Simpson* was living or dead, had received a Letter from *William Simpson* of the 12th of *August* as follows: "In Reply to your Letter I have to say, that *Alexander Simpson*, formerly in the Employ of Mr. *Pierce*, died some Years ago at *Gibraltar*." The Affidavit further stated, the Deponent was informed and believed there was, at the Date of the Affidavit, no Person living who could prove the Act of Bank-

(a) *Ante*, p. 216.

ruptcy

ruptcy upon the Proceedings, or any Act of Bankruptcy of *Thomas Ibbot Pierce*, and that *Alexander Simpson* was the only Person who did or could prove the Act of Bankruptcy.

1815.  
BRICKWOOD  
v.  
MILLER.

*Sir Samuel Romilly* for the Plaintiffs.

The Order of the 11th of *July* imposes upon the Plaintiffs a Necessity of proving that, which from the Death of *Simpson*, it has become utterly impossible for them to prove. The Court never would have made that Order, if it had known in what Situation the Plaintiffs were placed: and that the Order ought now, under the Circumstances, to be discharged. Unless it is discharged, the Plaintiffs must fail in their Suit.

*Mr. Lovat* for the Defendant.

It would have been absurd for the Defendant to have applied for the Order of the 11th of *July*, if he had not supposed the Plaintiffs would be unable to prove those Facts which such an Order was intended to put them upon Proof of: and the Court, when it made the Order, must have contemplated the Probability that the Plaintiffs would fail in Proof. The Intention of the Order was to put the Plaintiffs in exactly the same Situation as they would have been in, if the Notice had been given before Rejoinder, according to the Act of Parliament. The Order does nothing more. It does not put the Plaintiffs in any worse Situation; for if Notice had been given before Rejoinder, the Plaintiffs could not have proved the Act of Bankruptcy, since *Alexander Simpson*, who was the only Person who knew any Thing about it, was then already dead, and was dead sometime before the Suit was instituted. Had he died after Rejoinder, the Case would have been very different.

1815.

BRICKWOOD

v.

MILLER.

*The Lord CHANCELLOR.*

This is a Point of very considerable Importance. I will confer with some of the Judges upon it.

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The Lord *Chancellor* a few Days afterwards said, he had conferred with some of the Judges, and they agreed with him in Opinion, that if at the Time the Order of the 11th of *July* was applied for, the Situation the Plaintiffs were unavoidably put in by *Alexander Simpson's* Death had been known, the Court ought not to have made the Order: and that the Order ought now to be discharged as far as it puts the Plaintiffs on Proof of the Act of Bankruptcy.

His Lordship directed that the Order of the 11th of *July* should stand; the Defendant consenting that the Deposition of *Simpson* upon the File of the Proceedings under the Bankruptcy, should be received as Evidence of the Act of Bankruptcy at the Hearing of the Cause.

COUNCIL  
ROOM,  
LINCOLN'S  
INN. Aug.  
1815.

*Ex parte* GRIFFITHS.

The Solicitor  
answerable to  
the Commis-  
sioners for  
their Fees.

THIS was the Petition of a Commissioner in a Commission of Bankrupt executed at *Bristol*, praying that the Solicitor to the Commission might be ordered to pay him the Fees for his Attendances under the Commission, together with his Disbursements and travelling Expenses (*a*).

(*a*) The Prayer as to the untenable. *Vide Ex parte* Disbursements and travelling *Harbin*. 1 Vol. 58.  
Expenses was abandoned as

Sir

Sir *Samuel Romilly* in Support of the Petition.

1815.

*Ex parte*  
GRIFFITHS.

Mr. *Cooke contra*, contended, that no Liability attached on the Solicitor, but on the petitioning Creditor or the Assignees. It was not pretended that the Solicitor had received Money from his Clients for the Purposes of the Commission—on the contrary, he was considerably in Advance.

*The Vice* CHANCELLOR.

The Solicitor is the Person who appoints the Meetings, and summons the Commissioners. The petitioning Creditor does not himself interfere, nor do the Commissioners know any Thing of them. The Solicitor should be prepared to pay the Fees at the Time, or should not induce the Expense. Who ever heard of a special Jury looking to the Parties for their Fees, or not receiving them from the Attorney?

Ordered.

*Ex parte* GOLDIE.—In the Matter of GOLDIE.

1816.  
Feb. 16.

THE Petitioner, on the 15th of *November* 1815, A Bankrupt surrendered himself to the King's Bench Prison in imprisoned Discharge of his Bail. A Commission of Bankrupt issued at the Date of against him; and on the 18th of *November* 1815, he his Protection, was declared a Bankrupt, and surrendered, and obtained is not privileged from subsequent Detainers. Subsequently to this, Detainers were lodged against him. It was alleged, that the Object of the Parties in lodging these Detainers, was to prevent the Petitioner bailing the Actions wherein he had previously surrendered; that if he was relieved from the Detainers, he could obtain the Benefit of the Rules as to the original

1816.

*Ex parte*

GOLDIE.

—In the  
Matter of  
GOLDIE.

nal Arrest, and, farther, could procure Bail, and obtain his Liberty.

The Question was, whether, under the 5th Geo. 2. c. 30. s. 5. the Protection of the Commissioners was good against the Detainers: the Section providing that the Bankrupt should be free from Arrest, Restraint, or Imprisonment, provided he was not in Custody at the Time of his Surrender.

It was argued in Support of the Petition, that the Intention of the Legislature, collected from all the Statutes constituting the Law of Bankruptcy, was, that the Bankrupt should be protected from Arrest and Imprisonment at the Instance of all Creditors, except of those at whose Suit he was in Custody, prior to the granting of his Protection. That a Right to detain could not exist where there was not a Right to arrest: and here it could not be maintained, that if the Bankrupt had succeeded in liberating himself upon Bail before these Detainers had been lodged, the detaining Creditor would have been authorized in arresting.

On the other Side, the express Terms of the Section of the Statute were relied on; and that whatever might have been the Intention of the Legislature, *quod voluit non dixit*. There was not a Promulgation of an Intention which a Court of Justice could recognise.

*The Lord* CHANCELLOR

Coincided in that View of the Case, and declined to make any Order.

Sir *Samuel Romilly* and Mr. *Rose*, in Support of the Petition.

Mr. *Hart* and Mr. *Heald* for the Respondents.

*Es*

LINCOLN'S  
INN.  
Feb. 24.  
1816.

*Ex parte* ROSCOE.—In the Matter of SER-  
GENFRY.

**T**HE Bankrupt previously to his Bankruptcy, it was alleged, had made improper Transfers of his Property to his Relations; and, amongst others, to a Mr. *Warrall* of *Liverpool*.

The Petitioner, the Assignee, summoned *Warrall* before the Commissioners. *Warrall* attended, but demurred to his Examination, unless his Expenses in travelling from *Liverpool*, of his Stay in Town, and of his Return Home, were previously paid.

The Assignees offered to pay such Expenses as the Commissioners, after the Examination, should think reasonable. The Commissioners however thought the Expenses ought to be paid in the first Instance, and assessing them at £25, they made a Minute on the Proceedings, that that Sum ought to be paid to *Warrall* previously to his Examination.

The Assignee now appealed from this Decision; and undertaking to pay whatever the Commissioners should, after the Examination, reasonably adjudge, prayed that the Minute might be expunged, and the Commissioners directed forthwith to proceed with the Examination.

Sir *Samuel Romilly*, and Mr. *Montague*.

This Question depends entirely upon the Construction of a Statute, in which the Party summoned is considered not as a Witness, but as one who has embezzled the Pro-

A Party attending Commissioners for the Purpose of being examined as to the Property of the Bankrupt, is not entitled to have his Expenses paid or ascertained, till his Examination is concluded.

1816.

*Ex parte*

ROSCOE.

—In the

Matter of

SERGEANT FRY.

perty of the Bankrupt. All Analogy therefore from the Practice at Law in Regard to Witnesses, is inapplicable. *Battye v. Gressly*. 8 East. R. 319. *Ex parte Benson*, ante, 75. *Hallet v. Mears*. 13 East. 15. (a).

Mr. Hart, and Mr. Cullen.

The Statute leaves this to the Discretion of the Commissioners. That they must withhold the Expenses until the Result of the Examination be ascertained, is to say what the Legislature has not said, that the Expenses of the Party summoned are to depend upon his Conduct. Immediately that the Party presents himself before the Commissioners, his Right to his Expenses attaches. At Law, the Witness has his Remedy against the one of two Litigants who exacts his Attendance: in these Examinations there are no Litigants. The Reimbursement is entirely dependent on the Commissioners.

*The Lord CHANCELLOR.*

However unreasonable it may be, that a Person put to the Inconvenience and Expense of attending for Examination before Commissioners, should not have a Source from which to derive his Reimbursement, is a Question with which I have nothing to do. The Point to be considered is, how far the Legislature has provided for that Reimbursement. Upon the Subject of Costs little is to be collected: the petitioning Creditor is expressly liable for the Costs of prosecuting the Commission to the

(a) HALLET v. MEARS. therefore not examined, may

One who is subpoenaed as a witness, and attends at the Trial, but there refuses to give his Evidence unless his Expenses are paid, and is maintain Assumpsit for his necessary Expenses of Attendance against the Party who subpoenaed him.

Choice

Choice of Assignees; at the Choice of Assignees, those Costs are directed to be ascertained; and the petitioning Creditor to be repaid by the Assignees out of the first Funds which shall come to their Hands. If those Funds should be insufficient, no Provision is made for the Contribution of Creditors: the petitioning Creditor must pay the Expenses himself. For the Costs of Witnesses no Provision is made, except by that single Clause of the Statute 1 Jac. 1. c. 15. s. 11. (if it can be considered as provided for by that Clause), or by Consequence of an implied Obligation on those, who, requiring their Testimony, have exacted the Attendance. Under the Statute of *James*, the Burthen is not thrown upon the Assignees, but expressly on the Creditors, to be rateably borne by them according to the Proportion of each of their several Debts. It is true that this Objection does not directly present itself in this Case. The Petitioner, as the Assignee, has undertaken to pay all reasonable Charges. It remains therefore only to be considered, to what Species of Witnesses, for it is only to "such Witnesses" as the Section provides for, that the Remedy is applicable.

1816.  
*Ex parte*  
 ROSCOE.  
 —In the  
 Matter of  
 SERGENFRY

The Statute of *Elizabeth* (a) empowers the Commissioners to call before them all Persons known or suspected to have the Property of the Bankrupt in their Possession, or to be indebted to his Estate; and to examine such Persons on Oath. Their Authority is confined to Persons of that Class, and within that Description. That Statute was found to be inefficient for its Object: nor can a better Explanation be given of that Inefficiency, than the subsequent Provisions of the Statute of *James* (b). Still, however, the Section of that Statute is, as the preceding one of the 13th of *Elizabeth* had been, directed against Persons known, supposed, or suspected to have

(a) 13 *Eliz. c. 7. s. 5.*

(b) C. 15. s. 10.



1816.  
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*Ex parte*  
 ROSCOE.  
 —In the  
 Matter of  
 SERGENFRY.

or detain the Bankrupt's Property, or to be indebted to him, or for his Benefit. Is the Construction of a Statute contemplating Persons thus characterised, to be governed by Analogy to the Rule which the Law has established for the Indemnity of Witnesses in ordinary Litigation? Certainly not: a Witness in a civil Suit may insist upon having his Expenses paid before he comes to the Trial; attending—he may refuse to give his Evidence until his Expenses shall have been paid to him; and having refused to give his Evidence unless that preliminary Step be complied with, he may, although never examined, maintain an Action for the Expenses he has incurred in obeying the Subpœna. A Proposition at which I should have hesitated, without the Authority of the Case adduced in Support of it (a).

Between a Witness at Law, and a Person attendant on the Examination of Commissioners under this Statute, there is a material Difference. It has been held over and over again, both here and elsewhere, that the latter is bound to attend, although his Expenses should not have been tendered to him (b). The whole Scope of the Act contemplates not a Witness, but a Person suspected; and although the latter Clause adopts the Word "Witness," yet strictly he is not a Witness till he has been examined. It seems to me to be a Rule most consistent with the Act of Parliament, and with Justice, that the Costs should be ascertained after the Examination, rather than before it. The Result of the Examination will afford a clearer View of what the Party examined as a Witness is entitled, in point of Expense, to be reimbursed. An Adjournment, for Example, might unexpectedly be made from Time to Time, and from Meeting to Meeting, without taking

(a) *Hallet v. Mears*, 13 75. *Battye v. Gresley*, 8 East R. 15. *East*, 319.

(b) *Ex parte Benson*, ante,

which

which into Consideration, it would be impossible correctly to ascertain the Expenses *cundo, redeundo, et morando*. Again, put the Case, that a Person so to be examined, had concealed one Hundred Pounds of the Bankrupt's Estates; would it not be a Matter of Regret, that the Assignees had, as a Condition precedent to his Examination, been obliged to pay a Sum of Money to a Person who had thus anticipated his own Repayment? The Policy of the Statute requires that the Examination should be first concluded. It is unnecessary to make any Order, but merely with these Observations, to leave the Case to the Re-consideration of the Commissioners.

1816.  
*Ex parte*  
 ROSCOE.  
 —In the  
 Matter of  
 SERGENFRY.

*Ex parte* DYSTER.—In the Matter of MOLINE.

1816.  
*Hilary*  
*Term.*

**T**HIS Case has been reported upon one of the Points arising in it, and stood over for Discussion upon the present Point, which is there stated in the Note (a). The Nature of the Transactions in which the Petitioner was engaged after he had entered into the Bond, and

A Broker of the City of London may maintain an Action on a Contract, or sustain a

Proof for a Debt, arising out of Transactions as a Merchant, although such Transactions are in Contravention of the Regulations under which he derives his Office, and to the Condition of the Bond which he executes, and to the Oath which he takes on his Appointment.

Not, however, if the Debt or Contract arises out of a Transaction in which he has acted both as Broker and Principal, that being void upon Principles of common Law.

(a) *Ante*, 236.

taken

1816.  
 {  
*Ex parte*  
 DYSSTER.  
 —In the  
 Matter of  
 MOLINE.

taken the Oath (a) as a Broker within the City of *London*, and while he still continued in that Employment, and upon which the Prayer of his Petition was founded, were, that for many Years previous to the Bankruptcy, the Petitioner was concerned with the Bankrupt and another Person in a secret Partnership in the Purchase and Sale of Hides and Skins; and during the Whole of such secret Partnership, he bought and sold Hides and Skins on Commission as Broker, and charged his Employers a Brokerage or Commission on the Sale or Purchase thereof, although some of such Goods were sold by him to the Bankrupt, on Account of their Partnership.

The Sums for which the Petitioner claimed to be entitled to prove, as Debts arising out of these Transactions, amounted to upwards of £20,000.

*The Lord CHANCELLOR.*

The Question presented upon this Petition for the Opinion of the Court is, whether Mr. *Dyster*, being a Broker of the City of *London*, and at the same Time trading as a Principal, can, in Respect of such his Dealings as a Principal, raise a Demand which a Court of Justice will recognise. The Objection has been stated two Ways: first, that by the particular Nature of his Office, a Broker of the City of *London* is precluded from Trading: that he has bound himself by the Penalty of a Bond, and the solemn Obligation of an Oath, not to trade. Secondly, that if as a Broker he is not precluded from Trading generally, yet that in this particular Instance, he has been acting as Broker in the identical Transactions in which he is interested as Principal.

The first Point of Objection resolves itself into this: whether the Proposition that a Broker of the City of

(a) *Vide* the Form of the Bond and the Oath in the Note, post, 352, 353.

*London*

*London* cannot act as a Principal, be founded on a Prohibition of general Law, or a mere municipal Regulation? If on the former, it is quite clear that a Court of Justice can give no Assistance to the Enforcement of Contracts which the Law of the Land has interdicted. If on the latter, although the Penalty of the Bond, and the Forfeiture of the Office, may be the Consequence of Disobedience, still the Contract would be unaffected. That a Man may bind himself not to do particular Acts, and yet make those Acts the Subject of an Action, is beyond all Contradiction. That the Obligor shall not exercise the Trade of which he parts with the Goodwill, within a given Distance, or except under certain Restrictions, or that he will not exercise any other Trade than that in which he is then engaged, would be no Answer to an Action arising out of a Breach of those Stipulations.

In this View of the Case it is material to consider, what are the precise Restrictions upon the Office of a Broker of the City of *London*. I have been furnished with the Records of that Corporation, and have looked into the Statutes from the earliest Period. The Result of the Records may be stated thus: to provide that no Person shall act as Broker without the Licence of the Mayor and Aldermen: that no Broker shall act by Fraud and Collusion, and shall bind himself not to do so, in a Penalty of £200. With respect to the Oaths, there has been a great Variety of Forms: the most ancient provide, that the Broker shall not buy or sell for his own Use. But, in 1708, the Form of the Bond, as it now stands, was settled upon the Report of the Recorder and Common Serjeant, pursuant to the Statute 6 *Ann. c. 16. s. 4.* and formed upon that Statute (a).

From

(a) By Statute 6 *Ann.* who shall act as Brokers  
c. 16. s. 4. All Persons within the City of *London*,  
and

1816.  
Es parte  
DYSTER.  
—In the  
Matter of  
MOLINE.

1816.

*Ex parte*

DYSTER.

—In the  
Matter of  
MOLINE.

From the earliest Period, as early as the Reign of *Edward the First* (a), the Object of all these “Restrictions, Limitations,

and Liberties thereof, shall “said Office and Employ-  
from Time to Time be ad- “ment, shall and do well and  
mitted so to do by the Court “faithfully execute and per-  
of Mayor and Aldermen of “form the same without  
the said City, for the Time “Fraud, Covin, or Deceit,  
being, under such Restric- “and shall, upon every Con-  
tions and Limitations for their “tract, Bargain, or Agree-  
honest and good Behaviour, “ment by him made, declare  
as that Court shall think fit “and make known to such  
and reasonable. “Person or Persons with

In the Year 1708, the Year “whom such Agreement is  
after this Act passed, the “made, the Name or Names  
Court of Mayor and Alder- “of his Principal or Princi-  
men made certain Rules and “pals, either Buyer or Seller,  
Regulations for the Govern- “if thereunto required; and  
ment of Brokers, which have “shall keep a Book or Re-  
ever since been, and still are “gister, and therein truly  
in Force, and by Virtue of “and fairly enter all such  
which, every Person previous- “Contracts, Bargains, and  
ly to his being admitted a Bro- “Agreements, within three  
ker, is required to enter into “Days at the farthest, after  
a Bond to the Mayor, Com- “making thereof, together  
monalty, and Citizens of *Lon-* “with the Names of all the  
*don*; and also to take an Oath, “respective Principals of  
the Forms of which are pre- “whom he buys or sells, and  
scribed by the same Rules “shall, upon Demand made  
and Regulations, and are in “by any or either of the  
Substance as follows: “Parties, Buyer or Seller  
“concerned therein, produce

Condition of the Bond.

“and show such Entry to  
“them, or either of them, to  
“That the said *A. B.* for “manifest and prove the  
“and during such Time as he “Truth and Certainty of  
“shall and do continue in the “such Contracts and Agree-  
“ments;

(a) Stat. Civ. Lon. 13 *Ed.* 1. Stat. 5. 2 Stat. 1. *Jac.* 1. c. 21.

Limitations, or Regulations," has been from obvious Policy to prevent the Broker trading on his own Account.

The

"ments; and for Satisfaction " Mayor and Aldermen in  
 " of all such Persons as shall " Writing, the Names and  
 " doubt whether he is a law- " Places of Abode of all and  
 " ful and sworn Broker or " every Person and Persons  
 " not, shall, upon Request, " as he shall know to use and  
 " produce a Medal of Silver, " exercise the said Office or  
 " with his Majesty's Arms " Employment, not being  
 " engraven on one Side, and " thereunto duly authorised  
 " the Arms of this City with " and empowered as afore-  
 " his Name on the other; " said, within thirty Days  
 " and shall not, directly or " after his Knowledge there-  
 " indirectly, by himself or " of; and shall not employ  
 " any other, deal for himself, " any Person under him to  
 " or any other Broker, in Ex- " act as a Broker within the  
 " change or Remittance, or " said City and Liberties  
 " in buying any Tally or Tal- " thereof, not being duly ad-  
 " lies, Order or Orders, Bill " mitted as aforesaid; and  
 " or Bills, Share or Shares, " shall not presume to meet  
 " or Interest in any joint " and assemble in Exchange-  
 " Stock to be transferred or " alley, or other public Pas-  
 " assigned to himself or any " sage or Passages within this  
 " Broker, or to any other " City and Liberties thereof,  
 " in Trust for him or them, " other than upon the Royal  
 " or in buying any Goods, " Exchange, to negotiate his  
 " Wares, or Merchandizes to " Business and Affairs of Ex-  
 " barter and sell again upon " change, to the Annoyance  
 " his own Account, or for his " and Destruction of any of  
 " own or any other Broker's " his Majesty's Subjects, or  
 " Benefit or Advantage, or " any other in their Business  
 " to make any Gain or Pro- " or Passage about their Oc-  
 " fit in buying or selling any " casions."  
 " Goods, over and above the  
 " usual Brokerage; and shall  
 " and do discover and make  
 " known to the said Court of

1816.

*Ex parte*  
 DYSTER.  
 —In the  
 Matter of  
 MOLINE.

Form of Oath.

" You shall sincerely pro-  
 " mise and swear, that you  
 will

1816.

*Ex parte*

DYSTER.

—In the  
Matter of  
MOLINE.

The Object, however, of these Regulations is foreign to the present Point, which depends entirely upon what is the legal Consequence of them.

It seems to me, that, if under the Words “ Limitations and Restrictions ” adopted in the Statute of *Ann*, the Mayor, Aldermen, and Commonalty of the City of *London* had a Power of giving to their municipal Ordinance the Effect of a legislative Prohibition, and of incorporating it in the Law of the Land, they have not done so. All they have done is, to provide, that, if a Broker shall act in a Manner contrary to that which the Policy of the Law thinks ought to govern his Conduct, he should forfeit his Bond, and be dismissed from his Situation. And they have added to this, the Hold upon his Conscience, by the Solemnity of an Oath. If, however, he is bold enough to incur the Consequences of a Violation of his Duty, they have not said that he shall not. The Objection has been frequently taken and over-ruled at *Nisi prius*; and I apprehend upon this View of it, viz. that the Penalty of this Conduct is the Forfeiture of his Bond and of his Office. The Oath not receiving a larger Construction than as binding himself to deal faithfully as a Broker, but not adopting, in that Construction, all the Circumstances of the Condition of the Bond.

Upon the second Branch of this Objection, I do not feel inclined to dispose of the Case, without a more particular Enquiry into the special Facts upon which it is founded. If they should be found to amount to this, that

|                                 |                               |
|---------------------------------|-------------------------------|
| “ will truly and faithfully ex- | “ taining to the Duty of the  |
| “ ecute and perform the Of-     | “ said Office or Employment,  |
| “ fice and Employment of a      | “ without Fraud or Collusion, |
| “ Broker between Party and      | “ to the best of your Skill   |
| “ Party, in all Things apper-   | “ and Knowledge.”             |

he

he has introduced himself as Broker and Principal in the same Transaction, a Contract arising out of such Conduct would, without Reference to any Act of Parliament, or other Regulation, but upon the Principles of common Law, be good for nothing. No Action could be sustained upon that Transaction so fraudulent: a Broker is to be considered either as the Agent of the Seller or the Buyer, or of both, bound honestly to exercise his Skill, and fairly to communicate his Opinion on the Subject of the Purchase to those who, for that Purpose, have confidently employed him; and it requires little Observation to show, how disqualifying a Circumstance to the fair Discharge of that Duty will arise, from the Interference of his own Interest. It would be impolitic and dangerous to enforce a Contract, arising out of such Circumstances. Upon this, however, there must be Enquiry; and I desire in what I have thrown out, not to be understood as anticipating a Result unfavourable to the Petitioner.

1816.

*Ex parte*

DYSTER.

—In the  
Matter of  
MOLINE.

*Ex parte* HEYWOOD.—In the Matter of HOLMES.

LINCOLN'S  
INN HALL.  
Aug. 1815.

**M**ICHAEL Humble and Samuel Holland carried on Business as Co-partners at Liverpool, under the Firm of Humble and Holland; Samuel Holland trading at the same Time in Partnership with T. Holmes, at Messina, under the Firm of Holland, Holmes, and Co.; and about the Month of July 1810, the latter House became considerably indebted to the former. In the Year 1810, Messrs. Holland and Holmes consigned a Cargo of Goods to James Waring of London, Merchant, by a Ship called the *Elegante*, and they directed Waring, out of the Cargo, to pay the Firm of Humble and Holland the Sum of £3000 on Account of their Debt, and

A Lien is a Right to possess or to retain.

A. consigns a Cargo to B. with a Direction to pay to C. out of the Proceeds a Sum of Money, and writes C. to that Effect.

C. has no Lien on the Proceeds.



1816.  
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*Ex parte*  
 HEYWOOD.  
 —In the  
 Matter of  
 HOLMES.

to accept Bills drawn by the Firm of *Humble and Holland* on him for that Sum : they wrote also to that Effect to *Humble and Holland*. *Humble and Holland* accordingly drew Bills of Exchange on *Waring*, for the Sum of £9000, but *Waring* declined to accept the Bills when they were presented to him for that Purpose, the Cargo having been attached in his Hands, at the Suit of other Persons, and *Holland, Holmes, and Co.*, subsequently wrote to, and desired him not to accept the said Bills. -

The Attachment was afterwards withdrawn, the Cargo sold, and the Proceeds paid over by *Waring* to *Anderson*, as the Assignee of *T. Holmes*, who had then lately become bankrupt. *Humble and Holland* also became Bankrupts, and this was a Petition presented by their Assignees, praying that they might be declared entitled to a specific Lien on the Proceeds of the Goods by the *Elegante*, in the Hands of *Anderson*, and that *Anderson* might be directed to pay to them, out of such Proceeds, or out of the general Estate and Effects of *Holland, Holmes, and Co.*, the Sum of £3000 with Interest.

Sir *Samuel Romilly*, and Mr. *Cullen*, in Support of the Petition.

Mr. *Hart*, and Mr. *Rose*, against it.

*The Lord CHANCELLOR,*

Upon the Hearing of the Petition, expressed his Opinion to be against the Lien claimed, and the Relief prayed by it; but, at the same Time intimated, that, if the Petitioners were inclined to try the Question in an Issue, they might be at Liberty so to do. And the Petitioners having elected to take an Issue, his Lordship was pleased to order the same to be tried in the Court of King's Bench.

The Issue was as follows: Whether *Michael Humble*  
 and

and *Samuel Holland* the Bankrupts, had any Lien, and to what Amount, at the Time of their Bankruptcy, on the Proceeds of the Cargo of the *Elegante*, mentioned in the Pétition; in which Issue, the Assignees of *Humble* and of *Holland* were directed to be the Plaintiffs, and the Assignees of *Holmes* to be Defendants.

1816.  
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*Ex parte*  
HEYWOOD.  
—In the  
Matter of  
HOLMES.

In Pursuance of this Order, the Issue on the 22d of *December* last, came on to be tried at *Guildhall, London*, before Lord *Ellenborough* and a special Jury, when

HIS LORDSHIP

Was of Opinion, that there was no Lien; which, in its legal Sense, meant a Right to possess or to retain. The Letter conveyed merely a Direction to *Waring* as to the Proceeds of the Cargo, but gave no specific Interest in them to *Holland* and *Humble*.

The Plaintiffs were nonsuited.

*Hassel v. Smithers*, 12 Ves. 119. *Williams v. Everett*, 14 East, 582.

*Ex parte* CUNDY.

THIS was an Application for a Supersedeas; and Whether a Person is to be considered a  
turned upon the Trading.

*Cundy* had been a Carpenter. Leaving that Trade, he became the Manager of a Theatre, and contracted the Debt upon which the present Commission had been issued against him. he has quitted Business, depends upon his Intention as to resuming it.

For the Supersedeas it was contended, that his trading as a Carpenter had ceased: against it—that it was merely suspended, not abandoned.

B B 2

The

1816.  
*Ex parte*  
 CUNDY.

*The Lord CHANCELLOR.*

His merely quitting the Trade of a Carpenter will not exempt him from the Bankrupt Laws, unless it were done with the Object absolutely of abandoning it, and completely detaching from himself the Character of a Trader. It must therefore be sent to a Jury to ascertain, whether at the Time this Debt were contracted, there was any Intention of resuming his Business.

*Cotton v. Daintry*, 1 Vent. N. P. Cases. *Ex parte Per-*  
 29. Mont. App. 66. *Ware-* *terson*, 1 Vol. 405.  
*ham v. Routledge*, 5 Espin.

1816.  
 Jan. 31.

*Ex parte WHITEHEAD.*—In the Matter of  
 ALSTON.

Commissioners  
 to ascertain  
 Value of An-  
 nuity by the  
 Price paid,  
 and the Time  
 of Enjoyment.

**A**LSTON, in Consideration of £2506, granted to the Petitioner an Annuity of £358 (a) during the Lives of Three Persons, and the Life of the Survivor, redeemable on Payment of the original Consideration, with an Advance of Two Quarterly Payments of the Annuity.

Upon the Bankruptcy of *Alston*, the Petitioner tendered to the Commissioners a Proof for the Sum of £6104, being the Value of his Annuity as ascertained by an Actuary. The Commissioners however thought, that the Agreement for Redemption must regulate the Value, and

(a) The Annuity was secured by Surrender and Assignment of Copyhold and Leasehold Premises; but that Circumstance was not noticed in the Argument.

that

that the Proof could not therefore exceed the Sum of £2685 (a).

The Petitioner appealed against this Adjudication, and by his present Petition prayed, that he might be admitted a Creditor for the Sum of £6104.

Sir Samuel Romilly, Mr. Hart, and Mr. Wingfield, in Support of the Petition.

Mr. Leach, Mr. Bell, and Mr. Montagu, contra.

*The Lord CHANCELLOR.*

*Ex parte Thistlewood* was decided on Circumstances which cannot govern the present Case, nor indeed establish any Principle generally applicable to this Subject. The greatest Uncertainty prevails both in the Master's Offices, and before Commissioners: some of them proceeding upon the Amount of the Price, deducting the Time of Enjoyment; others upon the Value at the Death, or at the Bankruptcy. This State of the Practice renders it necessary, both with Reference to the Proceedings in Bankruptcy, and in the Master's Office, that a Rule should be established; and in this Instance it would have been more satisfactory, if the Question had arisen upon an Exception to a Master's Report in a Cause, and the general Practice fixed upon an Appeal to the House of Lords.

The Statute has nothing to do with the Proof in this Case, further than as it directs the Value of it to be ascertained by the Commissioners. And for this Purpose,

(a)	£2506
Two Quarters Payment	179
	<hr/>
	£2685
	<hr/>

three

1816.

*Ex parte*

WHITE-

HEAD.

—In the  
Matter of  
ALSTON.

1816.  
*Ex parte*  
 WHITE-  
 HEAD.  
 —In the  
 Matter of  
 ALSTON.

three different Modes have been adopted : 1st, the Price paid; 2d, the Price paid qualified by the Time of Enjoyment; and 3d, as in this Instance, the Redemption Price. In this Case I think the Commissioners are wrong. The Redemption Price cannot be the Criterion of Value: the Redemption Price is fixed with Reference to a Contract to redeem, not on Contemplation of Proof upon Insolvency. It proceeds upon a Supposition, false in Fact, that the Annuity is to remain independent of all the Variation which may affect it, both with Reference to the Time of the Enjoyment, and the falling of the Lives for which it is limited.

Taking the Price paid as the Criterion of Value, it is not improbable, that what may have been considered as a fair Price by the contracting Parties at the Time, may be subsequently considered by them to be, and may in Point of Fact be, an unconscientious Advantage by one or the other of them. Still however the Price paid should be admitted as a strong, though not a conclusive Circumstance, in the Estimation of the Value.

Upon the best Consideration therefore of this Subject, my Opinion as to the Intention of the Legislature in this Section of the Statute is, that where there are not any special Circumstances in the Case, the Commissioners should ascertain the Value, upon the Basis of the original Sum paid, qualified by the Time of the Enjoyment.

*Ex*

1816.

March 8th.  
LINCOLN'S  
INN HALL.

*Ex parte* GARLAND—In the Matter of  
VENABLES.

ON the 20th of *March*, the Day appointed for the Commissioners Choice of Assignees under this Commission of Bankrupt, the Petitioners attended at *Guildhall* for the Purpose of proving their Debts, and voting in the Choice of Assignees. *Garland* was admitted to prove the Sum of £2018 11s. 9d. and another Creditor the Sum of £315 9s. 0d.; and no other Person being prepared to establish any Debt against the Estate, the Creditors who had proved proceeded to the Choice of Assignees. The Petitioners were elected to that Office, which they accordingly accepted; and the usual Memorandum of such Election was entered upon the File of the Proceedings.

have a Power to adjourn the Choice of Assignees from the Day publicly appointed for that Purpose, although all the Creditors present concur in an Election.

The Commissioners however declined to execute an Assignment of the Estate and Effects of the said Bankrupt to Petitioners, on the Ground that *John Riddan*, resident in *London*, and represented to be a Creditor of the Bankrupt to an Amount which would have considerably influenced or controlled the Choice of Assignees (a), was, by Indisposition, prevented from then and there attending to establish his alleged Debt, and the Commissioners made a Memorandum to that Effect, and adjourned the Choice of Assignees until *Saturday*, the 9th of *March*.

(a) He had sent an Affidavit of this Debt, and a Person was in Attendance on his Behalf, under a Power of Attorney, but as he was a resident in *London*, his Affidavit was inadmissible.

The

1816.  
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*Ex parte*  
 GARLAND.  
 —In the  
 Matter of  
 VENABLES.

The Petitioners contended, that the Commissioners had acted erroneously in declining to execute the Assignment to them, and in postponing the Choice of Assignees from the Day publicly appointed for that Purpose ; and prayed that they might be declared to have been duly elected the Assignees of the Estate and Effects of the Bankrupt, and to be entitled to have an Assignment thereof executed to them by the Commissioners.

It was admitted, that the Course adopted by the Commissioners in this Instance, was in Conformity with the Practice at *Guildhall*; but that Practice was said to be in direct Contravention of the Stat. 5 *Geo.* 2, and the general Convenience and Policy of the Bankrupt Law. That it had been so considered by Lord *Hardwicke*, in *Ex parte Simpson*, and in *Ex parte Gregnier* (a), and by Lord *Eldon* C. in *Ex parte Rashleigh* (b).

*The Vice* CHANCELLOR

Thought the contemporaneous and continued Practice of the Commissioners, unopposed by any direct Decision, was the best Exposition of the Statute. That a Power of Adjournment was not withheld by express Words, and was a discretionary Incident to their Functions, upon the Ground of Convenience, and upon general Principles applicable to all Jurisdictions.

Mr. *Rose* in Support of the Petition.

Mr. *Montagu*, *contra*.

(a) 1 *Atk.* 68. 70. 91.

(b) 1 Vol. 192.

1816.

*Ex parte* HUNTER and HEBDEN.—In the Matter of BECHER. 10th June.

**T**HE Petitioners and *Fidgeon*, as the Assignees under this Bankruptcy, opened an Account with the Bank of *England*, and paid in the Proceeds of the Estate, as they were realised. *Fidgeon* absconded, and was declared bankrupt; but did not surrender to his Commission. A Dividend having been ordered of *Becher's* Effects, the Petitioners, for that Purpose, drew upon the Bank, who refused to pay the Drafts without the additional Signature of *Fidgeon*. Money deposited in the Bank in the Names of three Assignees, ordered to be paid to the Checks of two, the third having absconded.

The Petition prayed that the Bank of *England* might be directed to pay Checks signed by the Petitioners only, to the Extent of the Bankrupt's Property there deposited.

*Ex parte Collins* (a) was cited as conclusively establishing the Propriety of the Application.

*The Lord CHANCELLOR*  
Made the Order.

(a) 2d Vol. *Cox's Cases in Chancery*, 427.



1815.

28th July.

## WHITWORTH v. GRAHAM.

The Commission and Proceedings are inadmissible Evidence of an Act of Bankruptcy for the Purpose of defeating a Conveyance.

**T**HIS was a Bill filed against the Defendants, as Assignees of *Davis* a Bankrupt. The Defendants admitted the Bankruptcy; but disputed the Validity of a Conveyance under which the Plaintiffs claimed, upon the Ground that it had been executed subsequently to the Act of Bankruptcy. As Evidence of this, they tendered the Proceedings. The Question was, whether within the 49 Geo. III. c. 121. s. 10. the Proceedings were admissible Evidence to sustain this Objection.

Mr. *Meggison* for the Plaintiff.

Mr. *Owen* for the Defendant (a).

*The Vice CHANCELLOR.*

Before the 49 Geo. III. the Validity of the Commission must have been established by Proof of the requisite Circumstances, although there was no Intention to dispute them, and the Party was not unfrequently defeated upon the formal Defect of his Evidence. To remove this Mischief, by dispensing with the Necessity of the Proof when the Commission was not in issue, was the Object of the Legislature. The Bankruptcy—that is, the Matter of the Bankruptcy, not the particular Act of Bankruptcy, is that alone which the Commission and the Proceedings under it, are to establish. To admit them, not to sustain the Title under the Commission, but incidentally to invalidate the Rights of Strangers, would produce the grossest

(a) *Simmonds v. Knight*, ante, 143. *Humphries v.*  
1 Vol. 358. *Ellis v. Shirley*, *Coggan*, 1 Vol. 226.

Injustice,

Injustice, in affecting the Interest of a Party by Evidence, of which, till the Moment it is produced, he is in Ignorance, and which has been taken without any Opportunity of its being met either by direct or by cross Examination.

1815.  
WHIT-  
WORTH  
v.  
GRAHAM.

LOWNDES v. TAYLOR.

1816.  
March 22d.

**T**HE Bill alleged, that *Taylor* had commenced, and was prosecuting an Action against *Lowndes*, to recover a Sum of Money; although, if the Accounts arising out of certain joint Dealings and Transactions were taken between them, a Balance of £136 would be found to be due to the latter. The Bill prayed a Discovery, an Account, and Payment of the Balance with the usual Submission, an Injunction, and general Relief. A Bankrupt may file a Bill for an Account and an Injunction, without making his Assignees Parties to the Suit.

Plea—The Bankruptcy of *Lowndes*.

Mr. *Bell*, in Support of the Bill, contended, that although a Plea for Want of the Assignees as Parties might have been admissible, yet that this of Bankruptcy, as a Plea in Bar, went further than the Case made by the Bill authorised.

Mr. *Horne*. This is not a Bill for Discovery merely, but for Relief: and Relief by Suit, the Plaintiff, as Bankrupt, is incompetent to seek. The Accounts, if taken in this Suit, will not bind the Assignees. They may at any Time file their Bill to have the same Accounts

1816.  
  
 LOWNDES  
 v.  
 TAYLOR.

counts taken again. The Plea is good as to the Relief, and, as such, is good as to the Discovery.

*The Vice* CHANCELLOR.

It is admitted, that if this were merely a Bill for Discovery, the Plea would be untenable. The only Question therefore is, whether a Bankrupt is entitled to Relief of this Nature, in a Suit to which his Assignees have not been made Parties. In the Course of the Argument, I intimated an Opinion that he might: and the Perusal of the Bill, and the further Consideration of the Subject, confirms that Intimation. A Court of Equity is the proper Jurisdiction for taking these Accounts: nor is it by any Means clear, that these Demands, arising out of partnership Transactions, could be adjusted in the Action at Law as a Set-off. Ought then the Plaintiff in the mean Time to be harassed with Proceedings at Law, in which the Merits of the Dispute between the Parties cannot be adequately adjusted? Although perhaps the Bill goes too far in praying that the Balance of the Account may be paid to the Plaintiff, yet in Substance the Equity ought to be sustained: and therefore let the Plea be over-ruled.

1816.  
 22d July.

*Ex parte* PEYRON.—In the Matter of RAMSAY  
 and FOSTER.

Assignees ordered to apply the Proceeds of one Bill of Exchange, in Satisfaction of another, upon Circumstances of specific Appropriation, or Substitution.

PEYRON was employed as the Agent of *Ramsay* and *Foster*, to purchase Hemp at *St. Petersburg* on their Account. The Purchases, which in the Course of this Agency he had from Time to Time Occasion to make, were more or less advantageous to his Employers,

according

according to the Rate of Exchange between *London* and *St. Petersburg*.

In *May* 1815, the Exchange happened to be more favourable to this Country than it had previously been, or was expected to continue. *Peyron*, to avail himself of it, but without any specific Directions to that Effect, drew a Bill of Exchange on *Ramsay* and *Foster*, dated the 28th of *May*, 1815, for the Sum of £1000, payable at Three Months, to the Order of *Gustaf Sterkey*. *Sterkey* cashed this Bill, and retained the Funds in his Hands to the Credit of *Peyron*, as a Fund applicable to the Purposes of purchasing Hemp for *Ramsay* and *Foster*, when an Opportunity should offer.

No Opportunity offered, and *Peyron* determined to withdraw the £1000 from *Sterkey*, and remit it to *Ramsay* and *Foster*, to meet his Draft on them; and he accordingly transferred £1000 from *Sterkey* to Messrs. *Severins*, of *St. Petersburg*, who were the general Correspondents of Messrs. *Ramsay* and *Foster* there. And, on the 25th of *July*, Messrs. *Severins* remitted a Bill of Exchange, at Three Months, drawn by Messrs. *Platzman* and *Gopler*, of *St. Petersburg*, on Messrs. *Busk* and Co., of *London*, for £1000 (a), payable to the Order of Messrs. *Ramsay* and *Foster*.

*Ramsay* and *Foster* became Bankrupts before the Bills reached this Country. The Bill on *Busk, Ord, and Co.*, came to the Hands of their Assignees, and they received the Amount of it. The Bill drawn by *Peyron* on *Ramsay* and *Foster* was dishonoured.

(a) It did not appear in what Manner the Difference of Exchange and of Discount was arranged in these Transactions.

1816.

*Ex parte*

PEYRON.

—In the

Matter of

RAMSAY

and

FOSTER.

The

1816.

*Ex parte*

PEYRON.

—In the

Matter of

RAMSAY

and

FOSTER.

The Petition prayed that the Assignees might be ordered to apply the Proceeds of the Bill on *Busk, Ord, and Co.*, in Satisfaction of the Bill drawn by *Peyron* on *Ramsay and Foster*.

The Case for the Petitioner was put on the Ground of the Bill on *Busk, Ord, and Co.*, being in Substance and Effect the Bill on *Ramsay and Foster*: as a specific Substitution for it:—upon the Fact that the Petitioner had acted merely for the Accommodation and Convenience of *Ramsay and Foster*:—upon the Hardship and Injustice of his being obliged to pay, and the Bankrupt's Estate being allowed to receive £1000 without any Consideration whatever:—upon the Analogy to short Bills, and upon the Cases of *Hassel v. Smithers*, 12 *Ves.* 119, and *Taylor v. Plumer*, in the Appendix.

Upon the other Hand it was urged, that the £1000 had become Part of the general Estate of the Bankrupt: that this was not a Case, of specific Appropriation: that if the Money might possibly be recovered in an Action at Law, yet the Petitioner was a Stranger to the Commission, and was not entitled to make an Application in the Bankruptcy.

The last Objection was answered by the established Practice in Cases of short Bills. That the Petitioner, by presenting the Petition, brought himself within the Jurisdiction, and the Assignees were always amenable.

*The Vice* CHANCELLOR

Made the Order. The Assignees to have their Costs from the Petitioner.

1816.

2d March.

Petition

amended, pay-

ing the Costs

of the Day.

The Petition was originally presented in the Name of *Rew*, who was the constituted Agent of *Peyron*, in *London*, the latter being resident at *St. Petersburg*. It was objected

objected that it ought to have been preferred in the Name of the Principal, and

*The Vice* CHANCELLOR

Being of that Opinion, permitted the Petition to be amended, paying the Costs of the Day.

1816.

*Ex parte*

PHYRON.

—In the  
Matter of  
RAMSAY  
and  
FOSTER.

In the Matter of RUTLEDGE.

July 23.

**T**HE Commission which issued in this Case having been ordered to be re-sealed, in consequence of an Error in the spelling of the Name of the Bankrupt, it afterwards appeared, that the Affidavit upon which the Docket was struck contained a similar Error; and, consequently, would not sustain the Commission in its present Form. An Application was therefore made to the Court by

Mr. *Cullen*, on Behalf of the petitioning Creditor, that the Affidavit might be re-sworn, and the Bond re-executed, without the Necessity of proceeding by an entirely new Docket; but

*The Lord* CHANCELLOR

Thought that the Practice as to the re-sealing a Commission did not extend to authorise the re-swearing of the Affidavit, and Re-execution of the Bond, and directed an Enquiry to be made as to that Point.

On this Day it was again mentioned, and stated to be material, on the Ground of Expense.

The

1816.

—In the  
Matter of  
RUTLEDGE.

*The Lord CHANCELLOR.*

The Question is, what is required by the Act? The Reason for allowing the re-sealing of a Commission does not apply; for, a Commission which is ordered to be re-sealed, to supply a Defect of Form, has not been proceeded upon: whereas, the Affidavit and Bond on striking the Docket, have been used for all the Purposes for which they were made: namely, for the issuing of the Commission. There must, consequently, be a new Docket, in order that the whole Proceeding may be as *de novo*.

LINCOLN'S  
INN HALL,  
1816.

July 26.

A Creditor  
ought not to  
act as a Com-  
missioner.

*Ex parte* PROSSER.—In the Matter of BROWN.

**I**N a Commission directed to Commissioners in the Country, the Name of a Gentleman who happened to be a Creditor of the Bankrupt had been inserted, and he had acted. This was an Application that he might be restrained from further Interference.

Sir *Samuel Romilly*, and Mr. *Montagu*, in Support of the Application.

Mr. *Cooke*, on the Part of the Gentleman who was the Object of the Application, intimated, that there was a Petition pending, to supersede the Commission; and the probable Result rendered an Order in this Instance unnecessary.

*The Lord CHANCELLOR*

Was of Opinion, that being a Creditor, he had been improperly included in this Commission: and that unless  
he

ie would release his Debt, he ought not to continue to act, and he must give an Undertaking to that Effect. That Intimation would probably be sufficient, and would preclude the Necessity of considering how far it was proper to suspend by an Order, the Exercise of an Authority delegated under the Great Seal.

1816.  
*Ex parte*  
 PROSSER.  
 —In the  
 Matter of  
 BROWN.

WILKINS v. FRY (a).

At the  
 ROLLS.  
 Feb. 1816.

**BOWYER**, *Overton*, and *Oliver*, being the Lessees of certain Iron and Coal-mines, by Indenture of 30th *December* 1809, assigned them by Way of Mortgage to Messrs. *Fry* and *Irving*, to secure the Re-payment of certain Sums then due, or thereafter to be advanced by them to *Bowyer* and *Co.*

Assignees  
 assigning the  
 Bankrupt's  
 Lease, are not  
 entitled to a  
 Covenant of  
 Indemnity,  
 either for  
 themselves or  
 the Bankrupt,  
 against the  
 Covenants  
 with the  
 Lessor.

In *September* 1812, *Bowyer*, *Overton*, and *Oliver*, became Bankrupts. They were then indebted to *Fry* and *Irving* in £60,000, secured by the Assignment. By an Agreement dated 12th *November* 1812, the Assignees agreed to sell, and *Fry* and *Irving* agreed to purchase all their Interest, Right, and Equity of Redemption, in and to the Premises.

To a Suit by  
 Assignees, the  
 Consent of the  
 Creditors is  
 unnecessary,

This Agreement had not been executed, as the Parties differed in the Settlement of the Conveyance; the Assignees contending, that it should contain Covenants on

where their Interests are not affected. Nor need all the Plaintiffs:—such as refuse to join may be made Defendants.

(a) 1 *Merrivale's* Rep. 262



1816.  
 ~~~~~  
 WILKINS  
 v.  
 FRY.

the Part of *Fry* and *Irving*, to indemnify the Assignees and the Bankrupts, against the Covenants for Rent, and other material Covenants in the original Lease: *Fry* and *Irving* contending, that as the Agreement had not provided by express Stipulation for such Covenants, they were not bound to enter into them, as incidental to the Contract. The Question was raised upon the present Bill for a specific Performance, in which *Wilkins*, one of the Assignees of the Bankrupts, was Plaintiff, and his Co-assignees, who declined to join in the Suit, and *Irving* and *Fry* the Vendees, were Defendants.

At the Hearing, two preliminary Objections were taken;—one, that the Plaintiff was not authorised by the Creditors to institute this Suit, as required by the Statute (a):—the other, that one Assignee was not entitled to sue, without the Concurrence of the others, or other of them:—that here, not only did they dissent from, but expressly disapproved of the Suit (b).

*His Honour the MASTER of the ROLLS,*

Reserved the Objections, till the Cause was heard.

Sir *Samuel Romilly*, Mr. *Bell*, Mr. *Preston*, Mr. *Wilbraham*, for the Plaintiff. *Staines v. Morris* (c).

Mr. *Hart*, Mr. *Cullen*, Mr. *Wetherell*, and Mr. *Hays*, for the Defendants.

*The MASTER of the ROLLS.*

As to the preliminary Objections, the only Question in this Cause is, whether the Defendants are bound to indem-

(a) 5 Geo. II. c. 30. s. these Ojections in their Answer.

(b) The Assignees stated (c) 1 Ves. & Beames, 8. nify

nify the Bankrupts or the Assignees, against the Covenants of the original Lease. If the Bankrupt or the Assignees are entitled to this Indemnity, the Dissent of some of the Assignees cannot prevent the Assertion of it; refusing to concur as Plaintiffs, Parties who have an Interest, may always be introduced into a Suit as Defendants.

1816.  
WILKINS  
v.  
FRY.

Neither in this Case is the Assent or Dissent of the Creditors material. The Section of the Statute immediately preceding that upon which this Necessity is said to be founded, prescribes the Time within which a final Dividend is to be made, unless some Suit at Law or in Equity be depending, or the Property be outstanding. As the probable Effect of a Suit in Equity would be to suspend or delay the final Dividend, and so materially affect the Interest of the Creditors, the Legislature has in this given them a Discretion, clearly however only to be exercised as to a Suit, which in its Consequences to the Property of the Bankrupt, and its Effect upon the Dividend, affected their Interest. This is not a Suit in which either Injury or Benefit can result to the Creditors: in which, therefore, their Interposition is unnecessary.

As to the Merits; the Covenants which the Vendor in the Absence of express Stipulation is entitled to require from the Vendee, as incidental to the Contract, and as in the Contemplation of the Parties to it, clearly appear in the Case of *Staines v. Morris*. The Object of a Lessee in parting with his Lease, is to relieve himself both from the Burthen and the Benefit of it; and it is but reasonable that the Party who is to enjoy the one, should indemnify against the other. In the Case of *Staines v. Morris*, the Lord Chancellor laid down that Doctrine. In that Decision, Sir William Staines was held to be bound by a personal Covenant, although he had not executed the Assignment in which it was contained. Taking the Estate under

1816.  
 WILKINS  
 v.  
 FRY.

the Instrument, he took it, subject to the Covenant; and his Executor had a Right to require from the Purchaser of that Lease, a Covenant of Indemnity. That however was the Case of an Executor, as such, bound to the Extent of Assets, for the personal Covenants of his Testator; and therefore, as reasonably entitled to the Protection of such an Indemnity, as his Testator himself would have been. Whether he possessed the Lease or not, to the Extent of the Assets, he would upon any Breach of the personal Covenant contained in it, be answerable in Damages; nor, by assigning, could he divest himself of this Responsibility.

The Situation of an Assignee is different: he takes by Operation of Law, if he thinks fit to take at all; for it is entirely in his Option. If he does take, it is subject only to such Consequences as attach upon all Assigns, a Liability to be sued on such Covenants as bind him in that Character as long as he retains it, and no longer. The Liability ceasing with the Privity of Estate out of which it arises, upon what Principle, therefore, can he require an Indemnity against a Risk, which passes from him with the Estate, which is the Subject of the Contract (a) ?

If then, Assignees not requiring, are not entitled to Indemnity for themselves, can they require it for the Bankrupt? I apprehend not. The Assignees do not take the Property of the Bankrupt by Virtue of any Contract, but by Operation of Law. It is wrested from him for the Benefit of his Creditors, nor can he, by any Terms, qualify their Application of it. Supposing that the Assignees

(a) His Honour observed, as they had but an Equity that if in a general Case it of Redemption, the Relief could be argued, that the was not called for, as they Assignees were entitled to had never incurred any Risk such a Covenant, yet here,

chose

chose to retain the Possession themselves, and to employ the Lease for the Payment of the Debts, what Protection or Indemnity could the Bankrupt require from them? If not doing that, they think fit to sell, what Right can that give the Bankrupt, if he had it not before? Does the Mode of employing the Property give a Right? and if they sell, unless there be express Stipulation, must not the Purchaser be presumed to contract for the Extent of Interest which the Assignees are entitled to sell, and to purchase it as fully and as beneficially as they can dispose of it? I very much doubt, whether Assignees would be justified in clogging the Sale with Covenants and Conditions, reducing the Value of the Property, which it is their Duty to make the most of, for the Benefit of the Creditors. In none of the Cases in which Bankrupts have been sued on such Covenants, although the Hardship has been strongly pressed, was any Mode of Protection ever suggested, except that of the Legislature? In some Degree that Relief has been afforded (*a*); but not to the Extent required in the present Case.

Upon the Whole, the Bill must be dismissed: with Costs against the Co-assignees; but as the Question is new, without Costs as to the other Defendants.

(*a*) 49 Geo. 3. c. 121. s. 19.

1816.  
WILKINS  
v.  
FRY.

*Hilary Term,*  
1816.

*Ex parte M'GAE.*—In the Matter of WOOD and  
OTHERS.

Agreement to pay into a Bank of Four Partners, Bills of Exchange, indorsed, and to take in Return their promissory Notes; Three of the Four become bankrupt. Bills are then paid in, and their Notes taken, and then the Fourth becomes bankrupt. The Assignee held not to be entitled to retain the Bills.

*WOOD, T. Smith, R. Smith, and J. Stein,* were Bankers at *Workington*. The Petitioner had a banking Account with them: and being in the Habit of receiving Bills of Exchange from the Captains of Vessels trading to *Workington*, it was in the Year 1809 arranged between him and his Bankers, that he should pay such Bills into their Bank, indorsing them, and should take out in Exchange their promissory Notes, they allowing him as a Consideration for such Issue of their Notes, Twenty-four Days' Interest on each Bill paid in.

The Parties proceeded respectively to pay in Bills, and take out Cash Notes under this Arrangement. On the 22d of *July* 1812, separate Commissions issued against *Thomas Smith, Robert Smith, and John Stein*.

On the 23d of *July*, the Petitioner received from the Bank, Cash Notes to the Amount of £105; and on the next Day paid into the Bank, indorsed, two Bills of Exchange for the Sums of £75 and £70 respectively, payable Twenty-one Days after Sight, and due on the 17th of *August*.

On the 4th of *August*, 1812, a Commission issued against *Walter Wood*: and on the 12th of *August*, the separate Commissions were superseded in Favour of a joint Commission against all the Members of the Firm.

The Cash Notes to the Amount of £105 remained in  
the

the Hands of the Petitioner; the Two Bills for £75 and £70, were in the Hands of the Assignees.

The Petition prayed (a) that those Bills, or (in the Event of their being received) the Proceeds might be paid to the Petitioner.

Sir *Samuel Romilly* and Mr. *Bell*, in Support of the Petition, argued, that the Bills having been paid into the Bank, after Acts of Bankruptcy had been committed by, and Commissions had been issued against, Three of the Four Partners, were paid in after the Contract had been thereby virtually determined, without any Consideration given for them, and when the Parties were incompetent to give any Consideration.

Mr. *Leach*, and Mr. *Montagu*, *contra*, contended, that the Bills having been indorsed over in the Way of Discount, the Property had passed. There could, in this Case, be no Stoppage *in transitu*. If this had been the Case of a sole Person becoming bankrupt, or if all the Four had become bankrupt previously to the Bills having

(a) The Petition contained a long Statement of the Mode of keeping the Accounts between the Parties, and insisted, in Addition to the Point stated in the Text, that several Bills which had been paid in in the Course of the Dealings previously to the first Bankruptcy, and were then in the Hands of the Assignees, were to be

considered as *short Bills*, and, as such, to be restored.

*The Lord CHANCELLOR*,  
Upon a former Discussion as to this Point, intimated his Opinion, that the Bills paid in antecedent to the Bankruptcy, were delivered to the Bankers as in the Nature of Discount, and that the Property in them had become vested in the Bankers.

been

1816.

*Ex parte*

M'GAR.

—In the  
Matter of  
WOOD and  
Others.

1816.

*Ex parte*  
M'GAE.—In the  
Matter of  
WOOD and  
Others.

been paid in, the Assignees would have taken them. Where was the Difference, that one of the Firm had remained solvent sometime longer? Either as Tenant in common with the Assignees of his insolvent Partners, or as their Survivor in Credit, he would have the complete Dominion over the Property so coming into the Bank.

*The Lord CHANCELLOR.*

This Question depends, not upon any Analogy from Cases of Stoppage *in transitu*, but upon the Construction of this particular Contract. I will, says the Petitioner, pay certain Bills into your Bank, and you shall in Return give me your promissory Notes. I will deliver these Bills to you the *Four*, not to One or more of your Firm, and the Assignees of the Rest; and I am to receive, as the Consideration contracted for, the Notes of you, the solvent Four, not of One or more of you, and the Assignees of the others. In this View of it, the Relation of Debtor and Creditor never subsisted prior to the Bankruptcy; and the Consideration failing, upon which alone the Bills were parted with, I think the Assignees are not entitled to retain them.

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*Ex parte* ROBERTS.—In the Matter of WANGAMAN and OTHERS.

*Ex parte* WELLS.—In the Matter of ROBERTS.

A separate  
Commission  
not superseded,  
to give Effect

**E**ARLY in *March*, a separate Commission issued against *Roberts*, to which he did not surrender. On the 28th of the same Month, a joint Commission to a joint one, where the Bankrupt has committed a Felony, in not surrendering to the separate Commission.

issued

issued against *Roberts*, including *Wangaman* and *Ryall*, his Partners. To this Commission, also, *Roberts* did not surrender. The Petition presented by *Roberts* in the joint Commission, prayed, that it might be superseded, upon an Objection to the petitioning Creditor's Debt. The Petition by *Wells*, presented in the separate Bankruptcy, prayed the Supersedeas of that Commission, in order to give Effect to the more convenient Administration of the Effects, both joint and separate, under the joint Commission.

To *Roberts's* Petition, the Objection of his Non-surrender to the joint Commission, was taken and allowed.

Upon *Wells's* Petition for the Substitution of the joint for the separate Commission, it was contended, that the Debt (a) upon which the joint Commission had issued was defective, and that the Court ought not to destroy a separate Commission, no farther impeached than as it was to give Way to a more convenient joint Commission, unless the Validity of the latter was indisputable. To this

*The Vice CHANCELLOR*

Assented; and, considering the Objection to the Validity of the joint Commission to be well founded, dismissed the Petition.

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The joint Creditors then applied for and obtained an Order to supersede their invalid joint Commission, and to take out another joint Commission; and having done so, they

(a) The Commission had expired at the Date of the issued upon a Debt for Goods Commission; but not at the sold on a Credit, which had striking of the Docket.

again

1816.

*Ex parte*

ROBERTS.

—In the  
Matter of  
WANGAMAN  
and Others.

*Ex parte*

WELLS.

—In the  
Matter of  
ROBERTS.



1816.

*Ex parte*

ROBERTS.

—In the  
Matter of  
WANGAMAN  
and Others.

*Ex parte*

WELLS.

—In the  
Matter of  
ROBERTS.

again preferred a Petition for the Supersedeas of the separate Commission against *Roberts*, stating, in Addition to their former Case of a more convenient Administration of the Effects under the joint Commission, that the separate Commission was invalid, in Respect of the Debt upon which it had issued.

Against this Application, the Circumstance of *Roberts* not having surrendered to his separate Commission was confidently relied on: and that, as in his Omission to surrender, there was nothing on his Part of Extenuation, nothing to induce the Indulgence of the Court, the superseding of the separate Commission would be to preclude a Prosecution which the Legislature had prescribed, and, in Effect, to pardon a Felony.

To this it was answered, that the only Question for the Consideration of a Court of civil Jurisdiction was the civil Rights of the Creditors, and the more convenient Distribution of their Debtor's Property amongst them. Admitting that Justice in this Case called for a Prosecution, the Ends of Justice might be accomplished, by depositing the separate Commission in the Bankrupt Office producible when Occasion required, instead of superseding it. But in this Case, the Omission to surrender to the separate Commission was not a Felony: this could only be, by omitting to surrender to a valid Commission. But here, the separate Commission, with Respect to the petitioning Creditor's Debt, could not be sustained.

*The Lord CHANCELLOR*

Was of Opinion, that he ought not to supersede a Commission, under which the Bankrupt, no Circumstances of Extenuation appearing, was exposed to a Prosecution for not surrendering, and he should very reluctantly make an Order for retaining a Commission in

the

the Office, for no other Purpose than to sustain that Prosecution. As the Objection however of the Felony depended upon the Validity of the separate Commission, and as that Validity was questioned upon the Doubt as to the petitioning Creditor's Debt, the joint Creditors might, if they thought fit, try the petitioning Creditor's Debt in an Issue, retaining their Petition in the mean Time.

Sir *Samuel Romilly*, and *Mr. Collinson*, in Support of the separate Commission.

*Mr. Leach*, *Mr. Montagu*, *Mr. Rose*, *contra*.

1816.

*Ex parte*

ROBERTS.

—In the  
Matter of  
WANGAMAN  
and Others.

*Ex parte*

WELLS.

—In the  
Matter of  
ROBERTS.

*Ex parte* SHILES.—In the Matter of SHILES.

1816.

*Hilary Term*.

THIS was the Petition of the Bankrupt for Liberty to surrender to his Commission. His Affidavit stated, that being advised by his Solicitor that the Commission could not be sustained, and that his Surrender was therefore unnecessary, he had, in Reliance on that Opinion, omitted to surrender.

He had preferred a Petition for a Supersedeas, which was then in the general Paper.

Bankrupt permitted to surrender, under Circumstances of innocent Omission, although the Assignees opposed.

The Assignees objected to his being permitted to surrender, not from any hostile Feeling towards the Bankrupt, but in Protection of the Commission, which, as Assignees, they were bound to sustain. The Bankrupt never could proceed with his Petition to supersede the Commission,

1816.

*Ex parte*  
SHILES.—In the  
Matter of  
SHILES.

mission, without having previously surrendered. The Court had in no Instance permitted a Bankrupt to surrender, where the Assignees opposed. If the Bankrupt would acquiesce in his Commission, the Assignees would consent to his Surrender, but as a preliminary Step to a Supersedeas, they were bound to resist it.

Sir *Samuel Romilly*, and Mr. *Horne*, in Support of the Petition.

Mr. *Rose* for the Assignees.

*The Vice* CHANCELLOR.

The Interference of the Court in these Cases is merely an Intimation of Opinion, that under the Circumstances of Non-surrender, a Prosecution for the Felony would be improper. The present is a Case of that Description.

Ordered.

*Ex parte Lavender*, 1 Vol. 56.

1816.

August 17.

*Ex parte* HUNTER.—In the Matter of PAYTON.

Although  
the Property  
of a Partner-  
ship be in One  
or more Mem-  
bers of it, with

an Interest in  
the Profits  
merely in the  
others, yet in  
Bankruptcy, the Property is administered as to the joint Creditors, as be-  
longing to them all.

**B**Y Articles dated the 20th *February* 1812, *Payton* and *Gill* formed a Partnership for 21 Years: *Payton* to be interested in Two-thirds of the Capital and Profits, *Gill* in One-third.

They so commenced and carried on the Business: but very soon after its Commencement, *Brown*, an old and confidential Servant of *Payton*, was admitted to a small

Share

Share of the Profits, not of the Capital. No other Articles were executed.

A joint Commission issued against *Payton*, *Gill*, and *Brown*.

There were no joint Creditors of *Payton* and *Gill*.

The separate Creditors of *Payton* contended, that as *Brown* had no Interest in the Capital, there could be no joint Property of *Payton*, *Gill*, and *Brown*. The only joint Property was that of *Payton* and *Gill*. That the joint Creditors of *Payton*, *Gill*, and *Brown*, could have no Right to the Property of *Payton* and *Gill*. As there were no joint Creditors of *Payton* and *Gill*, their joint Property became divisible amongst their respective separate Creditors. The present Petition prayed a Declaration and an Order to that Effect.

Mr. *Leach*, and Mr. *Montagu*, in Support of the Petition.

*The Lord CHANCELLOR*

In the Course of the Argument, interposed. There is scarcely a Partnership in which the Members of it are not entitled in different Interests; and yet, upon a Bankruptcy, their Creditors take it as the promiscuous joint Property of them all. It may be perhaps difficult to say, how the Rule obtained at first, but it is now too well established to be controverted.

Petition dismissed.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Cullen*, were to have argued for the joint Creditors.

1816.

*Ex parte*

HUNTER.

—In the  
Matter of

PAYTON.

*Es*

1816.

August 27.

*Ex parte* SKERRATT.—In the Matter of HEWITT.

A Father, Member of a Bank, transfers a Sum of Money to the Credit of his Son with the Partnership. For this Credit, the Son is entitled to prove under a Commission against the Firm.

IN 1813, a Partnership as Bankers was established between *Hewitt, E. Bowman*, and his Son, *John Bowman*: *Hewitt* having Two-fifths, *E. Bowman* Two-fifths, and *J. Bowman* One-fifth of the Concern.

*E. Bowman* was desirous of introducing a younger Son, *Henry*, (then employed as a Clerk, at a Salary of £80 a Year) into the Partnership, and to give him one of his, *E. Bowman's* Two-fifth Shares; but as *H. Bowman*, although of Age, was then very young, it was considered by the other Partners to be expedient, that the Admission of *Henry* into the Concern should be deferred.

*Henry Bowman* continued as Clerk. He had a private Account opened for him with the Bank, in which he was credited for his Salary, and his Father, to put him upon a Footing with his Brother, and as a Compensation for his not having a Share in the Bank, occasionally carried to *Henry's* Credit different Sums of Money, the Particulars of which, and the Times of the Transfer, were specified in the Petition. The Balance of these Sums, to the Amount of £1055, were standing to the Credit of *Henry Bowman* at the Time of the Bankruptcy, and for this Sum he had been admitted a Creditor under the Commission.

The Assignees now petitioned to expunge the Proof. It was admitted that the Transaction, otherwise than as the Point arose upon the preceding Statement, was unobjectionable;

jectionable ; that *Henry Bowman's* Account had been regularly credited, and the Father's Account debited with the Sums transferred, without any Contemplation of Bankruptcy. The Question was, whether or not, within the Statute of 1 *James* 1. c. 15. s. 5. a Proof was admissible.

1816.

*Ex parte*  
SKERRATT.  
— In the  
Matter of  
HEWITT.

It was admitted (by Mr. *Rose* for the Assignees) that the Cases *Ex parte Shorland* (a) *Kensington v. Chandler* (b), apparently sanctioned the Proof. The Cases might, however, be distinguished. *Ex parte Shorland* was a mere Gift of Money, and for the Advancement of the Child. *Kensington* and *Chandler* proceeded upon the express Ground, that Money was not mentioned in the Statute. Both were Cases of Gifts executed. Here however the Property might be considered as in Transit, and before it was completely vested, the Rights of the Creditors had intervened.

Mr. *Cooke* argued in Support of the Proof, that the Cases cited were not on Principle distinguishable from the present; that in Substance and Effect, the Transfer in Account was Money actually vested in the Son. It must have been paid to his Checks, as to those of another Customer, and could have been drawn from his Credit by no other Means. In Point of Fact, he had from Time to Time drawn out various Sums in that Manner.

*The Lord CHANCELLOR*

Expressed his Opinion in Coincidence with the Argument of Mr. *Cooke*, and

Dismissed the Petition.

(a) 7 *Vesey*, 88. 1 Vol. *ler*, 2 Vol. 155. 2 *Maule & Selwyn*, 36. *Ex parte Smith*, 208.

(b) *Kensington v. Chand-* 1 Vol. 208.

*Ex*

1816.

August.

*Ex parte* GLOSSOP.—In the Matter of KEMP.

Petitioning  
Creditor re-  
sponsible for  
the Production  
of a Bill of  
Exchange, up-  
on the direct  
Proof of which,  
the petition-  
ing Creditor's  
Debt has been  
established.  
Petitioning  
Creditor bound  
to be Assistant  
to the Commis-  
sion in all its  
Stages.  
Petitioning  
Creditor de-  
claring Com-  
mission to be  
invalid, held  
liable for the  
Costs of En-  
quiries occa-  
sioned by that  
Declaration.

A COMMISSION issued against *Kemp* upon the Petition of *Clishold*, and the Petitioners were appointed the Assignees.

The Petitioners stated, that upon Inspection of the Proceedings, they found the petitioning Creditor's Debt was upon a Bill of Exchange for £250, drawn by a Person of the Name of *Thornhill* on, and accepted by, the Bankrupt, and indorsed by *Thornhill* to *Clishold*: but the Deposition did not set forth how, and for what Consideration the Debt arose, nor the particular Times or Time when the Bill was given.

After the Choice of Assignees, *Clishold* stated to their Solicitors, that the Commission was virtually bad. In Consequence of such Declaration, they called upon him for an Explanation, when he admitted that he had made such a Declaration, that he had his Reasons for so doing; that he had signed a Consent to a Superseas: that the Commission was not a good one, because the Consideration of the Bill was for a gambling Debt.

The Petitioners being large Creditors and Assignees, were desirous of ascertaining upon what Footing they stood, with Regard to the Commission. They therefore presented a Petition, the Object of which was, that Enquiries might be directed, as to the Validity of the Commission, and that if it should be found to be defective, it might

might be superseded, with Liberty for them to take out another.

In Pursuance of an Order made upon that Petition, the Commissioners proceeded to inquire into the Validity of the Commission, and reported in its Favour.

Another Petition had been presented in the same Matter, stating, that in *Easter* Term 1815, the Petitioners commenced an Action against certain Debtors to the Bankrupt's Estate, who gave them Notice of their Intention to dispute the Commission, and the Petitioners therefore served *Clishold* with a Subpoena *duces tecum*, to produce the Bill for £250, and they also summoned him before the Commissioners to examine him as to where the Bill was; but he would not discover whether he had the Bill, or whether he had parted with it, or what had become of it.

The Petition therefore prayed, that *Clishold* might be directed to furnish the Petitioners with the necessary Evidence to support his Debt as petitioning Creditor under the Commission, or that the Commission might be superseded at the Costs of *Clishold*, and that the Petitioners might be at Liberty to take out another Commission, and that *Clishold* might be ordered to pay the Costs of the Application, and the Expenses attendant upon the several Inquiries.

These Petitions had been disposed of: they now remained to be spoken to only as to the Costs of the Application, and the Expenses of the Inquiry.

Sir *Samuel Romilly* and Mr. *Cooke*, for the Assignees.

Mr. *Hart* and Mr. *Bell*, for the petitioning Creditor.

VOL. II.

D D

The

1815.

*Ex parte*

GLOSSOP.

—In the

Matter of

KEMP.



1816.

*The Lord CHANCELLOR.*

*Ex parte*  
GLOSSOP.  
—In the  
Matter of  
KEMP.

The petitioning Creditor is the moving Principle which regulates the whole Proceedings under the Bankruptcy, and it is his Duty to throw no Aspersion or Doubt on that Commission which originates from himself, for the Validity of which he has pledged himself at the issuing, and which, in all its Stages, he is bound to be assistant to. Has such been the Conduct of Mr. *Clishold*? In disposing of the only Question,—the Costs of the Steps which have been taken to ascertain the Validity of the Commission, from whom, let it be asked, has the Necessity of these Steps, and of this Expense arisen? from the petitioning Creditor: from the unguarded Declaration and imprudent Conduct of the petitioning Creditor. Ought then the Bankrupt's Estate to pay these Costs, or the Person by whose imprudent Conduct, to say the least of it, these Costs have been occasioned? Certainly by the latter.

In the Action brought by the Assignee, it was impossible to say that Notice to dispute the Validity of the Commission would not have been given. Notice was given: and in order to sustain the Requisite as to the Debt, either the Bill of Exchange must have been produced, or a Ground laid for the Admission of secondary Evidence, for the petitioning Creditor's Debt had not been proved as for Goods sold, or any other Consideration, excepting the Bill, but as a direct Proof upon the Bill itself.

I will not suffer a petitioning Creditor, thus establishing the Commission, to say the Bill is in any other Hands than his own. He had proved it under the Commission, and if *Thornhill* had afterwards paid it, yet his Proof would be in Trust for *Thornhill*, and the Bill should

should have been forthcoming for the Purposes of the Dividend. And even supposing that it could not be carried so far, and that *Clishold* was not bound himself to have retained the Bill; yet still he never could be permitted to say that he was ignorant where the Bill was to be found, if he was not himself able to produce it, as the Foundation of the Commission. Putting it at the lowest, he ought to have taken reasonable Care that that Evidence, if necessary, would be forthcoming; and he has, even in that View of his Duty, been inattentive. Why then is the Bankrupt's Estate to be put to the Expense of the Inquiries as to this Bill?

For the Sake of general Convenience, it is impossible not to say, but that *Clishold* must pay the Costs.

*Vide Ex parte Jackson, ante, 188.*

1816.  
*Ex parte*  
 GLOSSOP.  
 —In the  
 Matter of  
 KEMP.

*Ex parte* BOLTON.—In the Matter of MACKENZIE.

LINCOLN'S  
 INN HALL.  
 August,  
 1816.

**M**ESSRS. *Swansey* and Co., joint Creditors of *Mackenzie* and *Macleod*, on the 3d of *February*, 1810, took out a separate Commission against *Macleod*; and on the 6th of *March*, 1810, they took out another separate Commission against *Mackenzie*.

An Order had been obtained for keeping distinct Accounts under the Commission against *Macleod*. Messrs. *Swansey* and Co. proved their Debt as a joint Debt under

not concluded himself to prove as a joint Creditor, but that refunding the Dividend with Interest, he might prove as a separate Creditor.

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this

A joint Creditor sues out two separate Commissions; under one he proves against the joint Estate, and receives a Dividend. Held, that he had

1816.

*Ex parte*  
BOLTON.

—In the  
Matter of  
MACKENZIE.

this Order, and received a Dividend. They afterwards proved their Debt as a separate Debt against the Estate of *Mackenzie*.

The Assignees of *Mackenzie*, by their present Petition, contended, that Messrs. *Swansey* and Co. had elected to rank as joint Creditors under both Bankruptcies; and that they were, therefore, not entitled to come in as separate Creditors under *Mackenzie's* Commission.

Messrs. *Swansey* and Co. stated upon Affidavit, that when they made their Proof under *Macleod's* Commission, and when they received the Dividend, they were ignorant of their Right to prove, if they thought fit, as the separate Creditors of *Mackenzie*. They offered to refund the Dividend with Interest.

Mr. *Bell* and Mr. *Garratt*, in Support of the Petition, contended, that Messrs. *Swansey* and Co. having elected to class themselves as joint Creditors, could not recede from that Election. *Ex parte Liddell*, ante, p. 34.

Sir *Samuel Romilly*, Mr. *Cooke*, and Mr. *Cullen* opposed it. Here was no deliberate Election. None are bound to elect without a full Knowledge of the Funds between which the Choice is to be made. *Whistler v. Webster*, 2 *Ves. junr.* 371. An Assignee, upon refunding what he had received under two Dividends, was in *Ex parte Capot*, 1 *Atk.* 218, allowed to make his Election to proceed at Law against the Bankrupt.

*The Lord CHANCELLOR.*

Since the Case of *Ex parte Crisp (a)*, a Decision now at least sanctioned by Time, it has been clearly settled, that

(a) 1 *Atk.* 134.

a joint

a joint Creditor may take out a separate Commission, and, taking out that Commission, he has a Privilege of Election, either to make his Proof against the separate or the joint Estate. By a joint Commission on the other Hand, he binds himself to resort to the joint Property. The Rule at Law, as to Executions, affords some Analogy. If a Creditor take out a joint Execution, he cannot afterwards take out a separate Execution; and a Commission is in the Nature of an Execution,—a joint Commission being as an Execution against all, a separate Commission as an Execution against the Individual: if a Creditor deliberately resorts to the Process of a joint Commission, he is, as a joint Creditor, proceeding on a joint Judgment and Execution; and having once elected so to do, he cannot alter it. No Determination approaches a Case like the present. Here are two separate Commissions at the Instance of the same Creditor. If it were the Case of one separate Commission thus awarded, the Creditor might say, I will take my Debt out of either the joint or the separate Estate; but to get at the joint Estate, there must be a special Order of the *Chancellor*. The joint Property is therefore reached but by Circuity; and being thus looked at, if the Creditor says I will rank under this Commission as against the joint Estate, and so ranking, receives a Dividend, say to the Extent of fifteen Shillings in the Pound, he still remains the Creditor of the solvent Partner as to the Five, and for that he may bring his Action, or he may take out a Commission; and taking out a Commission, until he completely knows, and which until then he only indirectly knows, the State of the joint Accounts under that Commission, he cannot be said deliberately to have elected. I think therefore he is entitled to re-consider his Mode of Proof: and refunding the joint Dividend with the Interest, let the Proof stand against the separate Estate.

1816.

*Ex parte*

BOLTON.

—In the

Matter of

MACKENZIE.

*Ex*

LINCOLN'S  
INN HALL.  
Aug. 1816.

*Ex parte* WILLOCK.—In the Matter of DAWES  
and Others.

Joint Creditors under an Order to prove against separate Estates, proving against one or more of them, exclusively of the Rest: the Estate so burthened, is entitled to Reimbursement from the others.

**D**AWES and his Partners were at the Time of their Bankruptcy, the registered Owners of a Ship; holding it, not as a Chattel of their Partnership, but in common. Certain Creditors on Account of the Ship, had obtained an Order for Liberty to prove their Debts against the separate Estates of *Dawes* and his Partners, on the Ground of there being no joint Property: they proved their Debt against the Estate of *Dawes*, and received a Dividend of fifteen Shillings in the Pound.

The Ship had been sold, and the Proceeds then remained vested in Exchequer Bills.

The Petitioner, as a separate Creditor of *Dawes*, claimed by his present Petition, to have repaid out of those Proceeds, to the Estate of *Dawes*, so much as had been paid beyond its Liability as proportioned to the Estates of his Partners.

Mr. *Cullen* in Support of the Petition, contended, that it ought not to rest with a Creditor, availing himself of this Order, to vary the Rights of the Partners as amongst themselves, and by his Act alone, selecting an Estate, to throw the Burthen upon that, in Exoneration of the others.

Sir *Samuel Romilly* for the Assignees under the other Commission, and Mr. *Benyon* for the Executor of a Partner who had died before the Bankruptcy, did not oppose.

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*The Lord CHANCELLOR.*

There is perhaps an Equity, that the Estate thus burthened, should be proportionably reimbursed by the others; but the Difficulty is, to ascertain the Rate of Reimbursement. Joint Creditors under this Order, not being confined to the separate Estates of any of the Bankrupts, select those they think fit; and it is difficult to say, how they may disperse their Proofs under it. Until it be known what has been the Burthen upon all, or any given Number of the Estates, it is impossible, in any particular Instance, to arrange the Reimbursement. You may take an Inquiry into the State of the Proofs, as against the different Estates: and upon the Result, apportion the Balances between them.

It being admitted, that there were no other joint Creditors than those who had gone in against the Estate of *Dawes* exclusively,

*The Lord CHANCELLOR*

Made the Order.

1816.

*Ex parte*  
**WILLOCK.**  
—In the  
Matter of  
**DAWES**  
and Others.

*Ex parte* WYLIE.—In the Matter of HUMBLE.

LINCOLN'S  
INN HALL.  
Aug. 1816.

**H**UMBLE and Holland, Partners; Strickland and Brickwood, Partners: and Fawcett: engaged in a joint Adventure to the *Brazils*, in the Ship *Ellis*, of which Humble, Holland, Strickland, and Fawcett, were the registered Owners; and a return Cargo was to be provided. Where several Firms are engaged in a joint Adventure, the Creditors of the Adventure, in the Event of Bankruptcy, and there being no joint Property, must prove against the Estates of the Individuals, not of the Firms.

*Humble*

1816.

Ex parte  
WYLIE.

—In the  
Matter of  
HUMBLE.

*Humble* and *Holland* were Ship's Husbands and Managers of the Adventure, and they were jointly interested in a Moiety of the Concern. *Strickland* and *Brickwood* were jointly interested in a fourth Part, and *Fawcett* had the remaining fourth Part. The Goods were consigned to the Petitioners abroad, and they, in Pursuance of the Orders of *Humble* and *Holland*, as Managers of the Concern, furnished the return Cargo. The Petitioners kept their Accounts with "*Humble* and *Holland*," being the Name by which the Persons concerned in the Adventure were designated, although *Brickwood's* Name did not appear on the Ship's Register. In the Course of the Transactions, the joint Concern became indebted to the Petitioners in the Sum of £2783 15s. 1d.

In December, 1808, *Humble* and *Holland* dissolved Partnership, and *Holland* entered into Partnership with *Williams*.

In 1810, joint Commissions of Bankrupt issued against *Holland* and *Williams*, and against *Strickland* and *Brickwood*. A separate Commission issued against *Fawcett*, and a separate Commission also against *Humble*.

The Petitioners tendered their Debt against *Humble's* separate Estate, which exceeded £15,000, whilst his separate Debts, including the Claim of the Petitioners, did not amount to £4000. The Commissioners rejecting the Proof, this Petition was presented, stating, that there was no joint Estate of the Parties interested in the Adventure, and therefore praying, that the Petitioners might be at Liberty to prove their Debt under *Humble's* Commission.

Sir *Samuel Romilly* and Mr. *Bell* for the Petitioners,  
stated

stated this to be the common Case of Proof against the separate Estate of one Partner, when there was no joint Estate of the Partnership (a).

Mr. *Hart* and Mr. *Bickersteth* for the Assignees of *Humble*, suggested, that there was some joint Property of all the Parties concerned in the Adventure; but as that was doubtful, they argued, that the Petitioners' Right of Proof was not against the separate Estate of *Humble*, but against the joint Estate of *Humble* and *Holland*. The Partnership ought to be considered as a Partnership of Three—the House of *Humble* and *Holland*—the House of *Strickland* and *Brickwood*—and *Fawcett*, the sole Trader: and if that was correct, the Petitioners could only establish their Claim against *Humble*, through the joint Estate of *Humble* and *Holland*, to which the Surplus of *Humble*'s separate Estate ought to be carried. It would be hard upon the joint Creditors of *Humble* and *Holland*, if these Petitioners, who were entitled in common with them, should intercept their Fund, and obtain Twenty Shillings in the Pound, to their Prejudice. If this Proof be allowed, there ought, at least, to be Contribution from the other Estates.

*The Lord CHANCELLOR*

Declared his Opinion, that as there was no joint Property, the Petitioners were entitled to prove against the separate Estate of *Humble*. There ought to be Contribution from the other Estates (b), which might be obtained by the Petitioners first proving against them, or, perhaps, by the Assignees of *Humble* under the late Statute, or, if necessary, by Petition: and the present Order must be without Prejudice to an Inquiry as to any joint Property, or to any Proceeding by the Assignees for Contribution.

(a) *Ex parte Peake*, ante. (b) See the preceding

54.

Case.

COOMBES'

1816.

*Ex parte*

WYLLIE.

—In the  
Matter of  
HUMBLE.



LINCOLN'S

INN.

Aug. 2, 1816.

## COOMBES' Case.

Where a Bankrupt committed by Commissioners is again brought before them, and is remanded, there ought to be a Warrant of Recommitment or Detainer, stating the Cause of Recommitment.

**M**R. *Coombes* had been, on the 2d of *July* 1816, committed by the Commissioners in his Bankruptcy, for not answering to their Satisfaction, and had moved for, and was this Day brought up, by Writ or *Habeas Corpus*. In the Course of the Discussion, whether or not the Answers appearing upon the Return ought to have been received by the Commissioners, or were *now* (a) to be considered as satisfactory, it appeared, that subsequently to his Commitment, he had been, on the 10th of *July*, called up before the Commissioners at a private Meeting, and again examined; and this second Account not being then considered to be more satisfactory than his first, they refused to discharge him, and remanded him upon the original Warrant.

*The Lord CHANCELLOR*

On learning this Circumstance, intimated an Opinion, that as the Bankrupt had been again brought up before the Commissioners, and re-examined, they ought to have made his subsequent Examination, if unsatisfactory, the Ground of another Detainer, and have remanded him upon a Warrant of Re-commitment, stating what had passed at such second Examination, in order that the whole Cause of Imprisonment might appear upon the Return to the *Habeas Corpus*. Upon this Point it was spoken to by the Counsel on both Sides.

It was contended, that it was not usual or necessary to state the Whole of the Examination upon the Warrant, but that Part only of it which the Commissioners, in their

(a) *Ex parte Oliver*, 1 Vol. 407.

Discretion, deemed to be unsatisfactory; the Rest would appear on the Proceedings. If the Commissioners arrive at a Point where they consider the Statement of the Bankrupt to call for the Exercise of this Authority, they may make *that* exclusively the Ground of Commitment, an unsatisfactory Answer is sufficient for the Warrant. Nor is there any Hardship in this to the Person committed. He is not bound by the Return to the Writ, he may go out of it; he may plead and traverse it, and the Court will look into Matter extrinsic. Thus in *Wilkes*' Case, it did not appear upon the Return, that *Wilkes* was a Member of Parliament: that Fact appeared *dehors* the Warrant. *Wilkes*, it is true, was discharged not upon that Ground, but still the Court listened to a Defect in the Warrant, established by collateral Evidence.

1816. ·  
COOMBS'  
Case.

In the Course of the Argument, *Nowlan*'s Case having been mentioned as one in which the Bankrupt, although he had undergone subsequent Examinations, was held to be legally detained upon his original Commitment (a):

*The Lord CHANCELLOR*

Directed the Record of that Case to be examined, and the Motion to stand over till the following Day.

On the following Day, a Copy of the Record in *Nowlan*'s Case was produced (b).

*The Lord CHANCELLOR.*

By the Record of *Nowlan*'s Case, it appears that the Bankrupt was examined at three distinct Meetings; and

(a) See the Cases on this Subject collected in the Note to *Ex parte Oliver*, 1 Vol. 407. See also *Ex parte Casidy*, ante, 217. *Hyams*, in the Appendix. *Howell's State Trials*, 20th Vol. 1374. *The King v. Wilkes*, 2 Wils. Rep. 151. (b) Vide page 401, post.

1816.  
  
 COOMBS'  
 Case.

at each was committed: and the Questions and Answers of the several Examinations were embodied in the Warrants. The Record presents so important a Precedent in the Exercise of this Jurisdiction, that I have directed it to be copied. In the present Instance, it is decisive:—that there has been a subsequent Examination, is not disputed. To that Fact, however, as a Ground of Discharge not arising upon the Writ, there must be an Affidavit.

Upon Principle indeed, I must confess I do not understand this Act (*a*), unless it throws upon the Commissioners the Necessity of stating all the Questions and Answers, as far as they are applicable to the Subject of Commitment. The Imprisonment proceeds upon an Answer deemed unsatisfactory; to induce Satisfaction is the Object of it: and if in the Result of a subsequent Examination the Imprisonment be continued, it is not the first Examination alone, but all that has occurred on the Subject of the Commitment, taken together, that authorises the Continuance, and constitutes that which the Court is called upon to investigate—the Cause of Detainer. As the Law now stands, every Principle is in Coincidence with this Necessity. According to the earlier Cases, if a Man chose to swear roundly and positively, be it probable, or be it improbable, his Statement was conclusive, and must have been received. Positive swearing is now not the Test, but Satisfaction to a reasonable Mind: in the first Instance, to the Mind of the Commissioners, in the next, to that of the Judge, as it were appealed to, upon an *Habeas Corpus*. Thus appealed to, the Court has to exercise its own Opinion upon the Reasonableness of the Examination: and suppose a Case of an Examination, in which twenty Questions have been put, and twenty An-

(a) 5 Geo. II. c. 30. s. 16, 17, 18.

swers have been given, and six only of those Answers have been unsatisfactory, is it not most material, that the Whole of those Questions and Answers should appear upon the Warrant? Is it not much more favourable to the fair Intention and honest Disclosure of the Person examined, that he has answered fourteen Questions out of twenty satisfactorily, than that of six he has answered them all unsatisfactorily? The Omission of the subsequent Examination may be either favourable or unfavourable: for even in this Case (desiring however to be understood as giving no Opinion upon the Merits) I might possibly have considered the first Examination, by itself, as satisfactory: and yet, upon connecting it with another, have found it improbable and inconsistent.

1816.  
COOMBS'  
Case.

But then the Difficulty is said to be obviated, inasmuch as all the Questions and Answers fully appear upon the Proceedings. They may, or they may not: but supposing they do, and that the Application for a Discharge upon this Writ is made, not to the *Chancellor*, but to a Judge at Chambers, by what Mode can *he* look into the Proceedings? It is true I as *Chancellor* am, indirectly perhaps, enabled to reach them, nor do I say, that a Judge at Chambers might not also compel their Production, but I certainly cannot tell in what Manner. And even if he could, or if I, upon an Application here, would assist him in that Object, still there must be a considerable Interval interposed; quite irreconcilable with the due Administration of judicial Relief, upon a Writ of *Habeas Corpus*.

For these Difficulties, (although the more modern Practice, I admit, has been different) no better Remedy can be suggested, than that all the Examinations, connected with the Cause of Commitment, should be stated in the Warrant of Commitment, and thus at once, and upon the  
Face

1816.  
 COOMBES'  
 Case.

Face of the Return, authentically and immediately, present the Propriety of Detention to the Consideration of the Court. This may be done either as an original Warrant of Commitment, or of Detainer, in the Nature of a supplemental Warrant. This has not been done in the present Instance: there is a Defect therefore in the Warrant, which, if formal, I might remedy, but which, as substantial, necessarily entitles Mr. *Coombes* to his Discharge.

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In the Course of the Sittings, the Lord *Chancellor* mentioned, that he had communicated the Case to Lord *Ellenborough* and Mr. Justice *Burrow*, then on the Home Circuit, and they concurred in his Opinion.

LINCOLN'S  
 INN HALL.  
 Aug. 1816.

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BROWN'S Case.

Where a Bankrupt committed by Commissioners is again brought before them, and is remanded, there ought to be a Warrant of Recommitment or Detainer, stating the Cause of Re-commitment.

THIS was likewise a Motion for a Discharge from Commitment, upon the Return of a Writ of *Habeas Corpus*, and was, in Effect, the same as the preceding Case, with this Difference only, that when *Brown* was brought up a second Time, the Commissioners did not put any Questions to him, but he stated to them what he considered as explanatory of his former Examination, and they remanded him on the original Commitment. For the Reasons given in the preceding Case, he was now ordered to be discharged.

In the first Case, Sir *Samuel Romilly*, and Mr. *Cullen*, were of Counsel for the Bankrupts. In the second, Sir *Samuel Romilly* and Mr. *Horne*.

In both Cases Mr. *Hart*, and Mr. *Montagu*, were of Counsel for the Assignees.

THE

1816.  
BROWN'S  
Case.

THE RECORD IN NOWLAN'S CASE.

I *John Kirby*, Keeper of his Majesty's Gaol of *Newgate*, in the Writ to this Schedule annexed mentioned, do hereby certify and return to our Sovereign Lord the King, at before the coming of the said Writ, (that is to say) on the 27th Day of *July* 1793, *James Nowlan*, in the said Writ also named, was brought and detained in my custody, by Virtue of certain Warrants of Commitment, the Tenor whereof are as follows: At *Guildhall, London*, the 27th of *July* 1793. Whereas his Majesty's Commission under the Great Seal of *Great Britain*, bearing Date at *Westminster*, the 23d Day of *April* last, founded upon the several Statutes made concerning Bankrupts, hath been awarded and issued against *James Nowlan*, of *Church Row, Aldgate, London*, Soap-boiler, Dealer and Chapman, trading under the Firm of *Mcgrath and Nowlan*, directed unto us (who have hereunto subscribed our Names, and set our Seals, and who have respectively taken the Oath appointed to be taken by an Act of Parliament passed in the fifth Year of the Reign of his Majesty, King *George* the Second, intituled, "An Act to prevent the committing of Frauds by Bankrupts," for Commissioners of Bankrupts to take before they act as Commissioners in the Execution of the Powers or Authorities given and granted by the said Act or Acts of Parliament now in Force concerning Bankrupts), and to *Isidore Ford*, and *Henry Jodrell*, Esquires, being the Major Part of the Commissioners named to execute the said Commission: and it having appeared to us, the Major Part of the said Commissioners in the said Commission named and authorised, upon good and sufficient Proof  
upon

1816.

BROWN'S  
Case.

upon Oath before us had and taken, that the said *James Nowlan* did, for the Space of about two Years and an Half before the issuing of the said Commission, use and exercise the Trade or Business of a Soap-boiler and Soap-maker, in buying of Tallow, Barilla, Oils, Rosin, and black Ash, and making up and converting the same into Soap, and selling the same when so worked up and converted as aforesaid, and sought and endeavoured to get his Livelihood thereby, as others of the same Trade or Business usually do: and that by Means of such trading and dealing as aforesaid, he the said *James Nowlan* became justly indebted unto *George Sharp*, of *Threadneedle-street*, *London*, Broker, in the Sum of £200 and upwards, for Money lent and advanced to the said *James Nowlan*, and for Money paid, laid out, and expended to and for his Use: and being so indebted, did, before the Date and issuing forth of the said Commission, become a Bankrupt, within the true Intent and Meaning of the several Statutes made and then in Force concerning Bankrupts, or some or one of them, and they did adjudge and declare him bankrupt accordingly: And whereas, the major Part of the Commissioners, in and by the said Commission authorised, did cause due Notice to be given in the *London Gazette* of the 27th Day of *April* last past, that the said *James Nowlan* was thereby required to surrender himself to the said Commissioners, in the said Commission named, or the major Part of them, on the second and eighth Days of *May* then ensuing, at eleven of the Clock in the Forenoon of each of the said Days, and on the eighth Day of *June* following, at ten of the Clock in the Forenoon of the said Day, at *Guildhall*, *London*, and make a full Disclosure and Discovery of his Estate and Effects: And whereas the major Part of the Commissioners under the said Commission met together at *Guildhall* aforesaid, on the said second and eighth Days of *May*, at the Time above-mentioned, in Pursuance of  
such

such Notice; but the said *James Nowlan* did not surrender himself to the said Commissioners, or make any Disclosure or Discovery of his Estate or Effects on either of the said Days, or send any Excuse why he did not: And whereas, the major Part of the Commissioners under the said Commission, met together at the *Guildhall* aforesaid, on the said eighth Day of *June* at the Time appointed in the *London Gazette* for that Purpose: and in Pursuance thereof, in order that the said Bankrupt might surrender himself, and make a Disclosure and Discovery of his Estate and Effects, at which Time a Petition from the said Bankrupt, preferred to the Right Honourable the Lord *High Chancellor of Great Britain*, praying that the Time for his Surrender and Examination under the said Commission might be enlarged for the Space of forty-nine Days, to be computed from the eighth Day of *June* then instant, with his Lordship's Order thereon for that Purpose written, bearing Date the first Day of *June* then instant, was produced; whereupon the Commissioners then present, being the major Part of the Commissioners in and by the said Commission named and authorised, did defer taking the said Examination till the 27th Day of *July* instant, at Eleven of the Clock in the Forenoon, of which Adjournment due Notice was given in the *London Gazette* of the 18th Day of *June* last: And whereas, the said *James Nowlan* attended us on this Day, in Pursuance of the said Order and Advertisement, in order to finish his Examination, and make a full Disclosure and Discovery of his Estate and Effects, and being then and there duly sworn and required by us to make such Disclosure and Discovery, we, the said Commissioners, did cause the following Questions in Writing to be propounded to him the said *James Nowlan*; to which Questions the said *James Nowlan* gave the following Answers: that is to say, "As you admit to have received £3505 within a Week before you absconded from *Lou-*

1816.  
BROWN'S  
Case.



1816.  
  
 BROWN'S  
 Case.

*don*, did you receive any Money within a Week before your Departure from *London*, over and above the said Sum of £3505?" To which the said *James Nowlan* answered, "I believe I did." And on being asked to what Amount, the said *James Nowlan* answered, "I cannot precisely say." And on being asked, "Will you swear you did not receive £2000 more?" the said Bankrupt answered, "I cannot." And the said *James Nowlan* afterwards made an Addition to the above Answer of the following Words: "I wish to correct the above Answer, because I recollect I did receive about £1000 above the £3505 within the last Week." And on the following Question being put, "As you say you were overturned in the Mail Coach upon your Road to *Dublin*, in the Month of *April* last, and that you then lost your Pocket-book, how much had you in your Pocket-book, at the Time the Coach was overturned?" To which the said *James Nowlan* answered, "£3500, or £3600 in Bank Notes." And on the following Question being put, "As you say you had not more Notes in your Pocket-book than £3600, and having received £1000 over and above £3505 within a Week before you left Town, how do you account for the Difference, which is about £900?" To which Question the said *James Nowlan* answered, "I cannot give any Answer;" and also added, in his own Hand-writing, "I correct this by not admitting to have received £1000 more, but that it did not exceed £1000, it might be from £400 to £600 more than £3500." And on being asked, "How do you account for the £400 or £600 more?" the said Bankrupt answered, "I cannot at present." Which Answers of the said *James Nowlan* not being satisfactory to us the said Commissioners, these are therefore to will, require, and authorise you immediately, upon Receipt hereof, to arrest and take into your Custody the Body of the said *James Nowlan*, and him safely to convey to His Majesty's  
 Prison

Prison of *Newgate*, and him there to deliver to the Keeper of the said Prison, who is hereby required and authorised, by Virtue of the Commission and Statutes aforesaid, to receive the said *James Nowlan* into his Custody, and him safely to keep and detain, without Bail or Mainprize, until such Time as he shall submit himself to us, the said Commissioners, or the major Part of the Commissioners by the said Commission named and authorised, and full Answer make to our or their Satisfaction, to the several Questions so put to him by us as aforesaid, and for so doing this shall be your sufficient Warrant. Given under our Hands and Seals, at the *Guildhall* of the City of *London*, the 27th Day of *July*, in the Year of our Lord 1793.

1816.  
BROWN'S  
Case.

To *Thomas Vaughan*, our Messenger, or to *John Kirby*, Keeper of His Majesty's Prison of *Newgate*, or to his Deputy there.

*John Calthorpe Gough.* (L.S)  
*John Bowles.* (L.S)  
*Peter Still.* (L.S)

At *Guildhall, London*, 24th *August*, 1793. Memorandum, that we, whose Names are hereunto subscribed, being the major Part of the Commissioners named and authorised in and by a Commission of Bankrupt awarded and issued against *James Nowlan*, of *Church-row, Aldgate, London*, Soap-boiler, Dealer and Chapman, (trading under the Firm of *Megrah* and *Nowlan*) having met here the Day and Year aforesaid, at the Request of the said Bankrupt, who was brought before us by Mr. *John Kirby*, Keeper of His Majesty's Prison of *Newgate*, to which Prison he, the said *James Nowlan*, had been committed by a Warrant under the Hands and Seals of *John Calthorpe Gough*, Esquire, *John Bowles*, Esquire, and *Peter Still*, Gentleman, (being the major Part of the

E E 2

Commissioners

1816.  
 BROWN'S  
 Case.

Commissioners named in and by a Commission of Bankrupt issued against the said *James Nowlan*, bearing Date the 27th Day of *July*, 1793,) for not satisfactorily answering certain Questions then put to him, and various Questions being now put to the said Bankrupt, and among others, the following Question? "Look at two Checks drawn by you, in your Firm of *Megrah* and *Nowlan*, on *Lefevre*, *Curries*, *Yallowby* and *Raikes*, one dated the 30th *March*, 1793, for £373 4s. 3d. payable to Mr. *Thomas Norton*, or Bearer, and the other, dated 2d *April*, 1793, for £222 6s. payable to Messrs. *Back* and Co., or Bearer, and indorsed, respectively, *Thomas Norton*, *John Back* and Co. Did you yourself receive those two Sums of £373 4s. 3d. and £222 6s. and if yea, how have you disposed of the Money?" To which he answered, "I did receive the Amount of these Checks, but I cannot at present disclose what I did with the Money." Which Answer not being satisfactory to us the said Commissioners, these are therefore to require and authorise you to continue to keep and detain the Body of the said *James Nowlan*, without Bail or Mainprize, until such Time as he shall submit himself to us the said Commissioners, or the major Part of the Commissioners by the said Commission named and authorised, and full Answer make to our or their Satisfaction, to such Questions put to him as aforesaid, and to the Questions in the said former Warrant specified, and for so doing, this shall be your sufficient Warrant. Given under our Hands and Seals, at the *Guildhall* of the City of *London*, this 24th Day of *August*, 1793.

To *John Kirby*, Keeper of His Majesty's Prison of *Newgate*.

*Randle Ford*. (L.S.)  
*John Calthorpe Gough*. (L.S.)  
*John Bowles*. (L.S.)

At

At Guildhall, London, 7th January, 1794. Memorandum, that we, whose Names are hereunto subscribed, being the major Part of the Commissioners named and authorised in and by a Commission of Bankrupt awarded and issued against *James Nowlan*, of *Church-row, Aldgate, London*, Soap-boiler, Dealer and Chapman, trading under the Firm of *Megrah and Nowlan*, having met here the Day and Year aforesaid, at the Request of the said Bankrupt, who was brought before us by Mr. *John Kirby*, Keeper of His Majesty's Prison of *Newgate*, to which Prison he, the said *James Nowlan*, had been committed, by two Warrants, one dated the 27th Day of *July*, 1793, and the other dated the 24th Day of *August*, 1793, under the Hands and Seals, the first of *John Calthorpe Gough*, Esquire, *John Bowles*, Esquire, and *Peter Still*, Gentleman; the second under the Hands and Seals of *Randle Ford*, Esquire, *John Calthorpe Gough*, Esquire, and *John Bowles*, Esquire, being the major Part of the Commissioners named in and by a Commission of Bankrupt issued against the said *James Nowlan*, for not satisfactorily answering certain Questions at such Times put to him, and various Questions being now put to the said Bankrupt, and amongst others the following: "What did you do with the Money you received upon the two Checks, drawn in the Firm of *Megrah and Nowlan*, referred to in the last Question upon your former Examination, and to which you answered, 'I did receive the Amount of the Checks, but I cannot now disclose what I did with the Money?'" to which the said *James Nowlan* now answered, "I did not receive the Money: I paid the two Checks to Mr. *Joseph Mather*, in part Discount of a Bill dated the 20th of *November*, 1792, for £854 3s. 7d. The Difference to make up that Bill I paid in Cash and Bank Notes, except the Discount, and £100 which I mistook, and which I paid him the Day before I went to *Ireland*." "When did you discount the said Bill at the Bank?"

1816.  
BROWN'S  
Case.

1816.  
  
 BROWN'S  
 Case-

Bank?" To which he answered, "It was discounted at the Bank the 28th of *March*, 1793, or within a Day or two of that Time." "Were the Checks, dated the 30th of *March*, 1793, and 2d of *April*, 1793, both delivered to Mr. *Mather* on the same Day?" To which he answered, "I cannot positively say whether they were or not." "What did Mr. *Mather* say to you about paying Duties when you delivered him the Checks, or the first of them?" To which he answered, "I think he said he wanted Money to pay Duties when I delivered him the first Check." "How much Money in Cash or Bank Notes did you pay Mr. *Mather* on Account of the above-mentioned Bill, and when did you make such Payment?" To which he answered, "I paid the Difference between the Amount of the Checks and the Bill, except the Discount, and £100 to Mr. *Mather*, at his House at the Time I delivered him the last Check." "Where did you get the Money?" To which he answered, "I took it with me from Home, to be sure, or perhaps I had been collecting it from my Customers," "Which of these Answers is the Fact?" To which he answered, "I cannot tell which." "What is the Date of the Bill which *Mather* was to take up?" To which he answered, "I do not know: but I believe it was for some Bill becoming due about the 23d of *May*, 1793; probably one of our own Bills accepted by Mr. *Mather*, and which he, *Mather*, was bound to take up." "How came you to get the Bill, dated the 20th *November*, 1792, discounted?" To which he answered, "I got it discounted at the Bank, for the Accommodation of *Mather*, to enable him to take up the Bill referred to in my Answer to the last Question, as *Mather* told me." "The following Question having been put to you on your first Examination on the 27th of *July*, 1793, namely, 'As you admit to have received £3505 within a Week before you absconded from *London*, did you receive any Money within a Week before your Departure

parture from *London*, over and above the Sum of £3505? now answer this Question." To which he answered, "I received to the Amount of £1000 or thereabouts." "What did you do with this £1000?" To which he answered, "I lost it with my Pocket-book, with the £3505, as mentioned in my former Examination, except about three £20 Notes." Which Answers not being satisfactory to us the said Commissioners, these are therefore to require and authorise you to continue to keep and detain the Body of the said *James Nowlan*, without Bail or Mainprize, until such Time as he shall submit himself to us the said Commissioners, or the major Part of the Commissioners by the said Commission named and authorised, and full Answer make to our or their Satisfaction, to the said Question put to him as aforesaid, and the Questions in the said former Warrants specified; and for so doing, this shall be your sufficient Warrant. Given under our Hands and Seals, at the *Guildhall* of the City of *London*, this seventh Day of *January*, 1794.

1816.  
BROWN'S  
Case.

To *John Kirby*, Keeper of His Majesty's Prison of *Newgate*.

*Randle Ford.* (L.S)

*John Bowles.* (L.S)

*Peter Still.* (L.S)

And these are the Causes of the-taking and detaining of the said *James Nowlan*, whose Body is herewith ready, as by the said Writ is commanded.

*John Kirby*, Keeper.

*Ex*

Aug. 1816.

*Ex parte* ANDREWS.—In the Matter of EMMETT.

Contingent Interest assigned to secure in Part a Debt exceeding the Value of the Interest: the Assignee insures against the Contingency; and upon its taking Effect, receives the Sum insured.

Held, upon the Bankruptcy of his Debtor, that the Sum so recovered must be deducted from his Proof.

**S**TEPHEN Emmett was indebted to *Charles Emmett*, and also to *Thomas Emmett*, in considerable Sums of Money; and being entitled, in Right of his Wife, to a Sum of £400 and upwards, in the Event of her surviving her Mother, he and his Wife assigned to *Charles Emmett* and to *Thomas Emmett* that contingent Interest, upon Trust, after Payment of their Costs and Expenses, &c. to retain their Debts, or as far as it would extend, and to pay the Surplus, if any, to *Stephen Emmett*. The Debts then owing to them respectively, exceeded the Amount of the contingent Interest.

After the Execution of the Deed, *Charles Emmett* and *Thomas Emmett*, at their own Expense, and without the Privity of *Stephen Emmett*, effected Policies of Insurance in £200 each, on the Life of the Wife. The Wife died, and *Charles* and *Thomas* received the Amounts of their respective Insurances. Shortly afterwards, a Commission of Bankrupt issued against *Stephen*; and *Charles* and *Thomas* being both of them respectively Creditors of *Stephen* beyond the Amount which it was the Object of the Assignment to cover, severally proved the Whole of their Debts under the Commission, without noticing or deducting the two Sums of £200, received upon the Insurance.

This was a Petition to expunge those Sums from their Proofs.

• Sir

Sir Samuel Romilly and Mr. West, in Support of the  
Petition. *Godsall v. Boldero (a)*.

Mr. *Wingfield* opposed it.

*The Vice* CHANCELLOR.

Upon the Argument, this Case was assimilated to that of *Godsall* and *Boldero*, of which it is the Converse: here the Party has recovered, not his Debt, but the Value of the Risk insured by his Policy. But it is said, that inas-much as in that Case the Transactions were blended, Payment by the Executors absolving the Office, so, *E con-verso*, Payment by the Office discharges the Debt. The Argument is forcible: it does not however necessarily follow, from the Court deciding, that the Party having been paid by the Executors, could not recover from the Office, would have decided, that if paid by the Office, he could not recover from the Executors. The Contract with the Insurance Office is a Contract of Indemnity, legal only as an Indemnity commensurate with the Interest of the insured. The Contract is to indemnify from Loss, and there was no Loss: that Case, therefore, though it bears on this Question, does not conclude it.

Another Point arises on the Assignment, which must decide this Case. The Assignment has placed *Charles* and *Thomas Emmett* in the Situation of Trustees. The

(a) *Godsall v. Boldero*, against the Loss of the Debt;  
9 *East*. 72. and, therefore, if after the

A Creditor may insure the Death of the Debtor, his  
Life of his Debtor to the Executors pay the Debt to  
Extent of his Debt, but such the Creditor, he cannot  
a Contract is substantially afterwards recover upon the  
a Contract of Indemnity Policy.

Bankrupt

1816

*Ex parte*

ANDREWS.

—In the

Matter of

EMMETT.



1816.  
 Ex parte  
 ANDREWS.  
 —In the  
 Matter of  
 EMMETT.

Bankrupt and his Wife conveyed their contingent Interest to them, as Trustees to act for them, with Indemnity against Expenses, and covenanting not to interfere; in short, expressly transferring their whole Right and Title. From the Date of this Instrument, the Bankrupt and his Wife could not, themselves, have insured in Respect of their Property: they no longer had an insurable Interest.

The Trustees then, acting in Part for themselves, in Part for the Bankrupt, do an Act beneficial to both Parties, at their own Expense ameliorating the Property, laying out Money for the Benefit of themselves, and their *Cestui que* Trust. The Result of the Act is, that the Estate is benefited £400: shall they be allowed exclusively to appropriate this Benefit?

It is clear, that a Trustee never can use to his own Benefit, the Property committed to his Trust; as in the common Instance of a Renewal of a Lease. Although it appears that the Lessor would not have renewed with the *Cestui que* Trust, yet the Trustee making a Contract for himself, and with his own Money, cannot set up a Title adverse to that he has undertaken to protect.

That is not precisely the present Case, because here the insured had an insurable Interest; but they had it, subject to all the Jealousy with which the Court regards a Trustee acting on the Property for his own Benefit. They never could have insured, unless the Property had been assigned to them. The Means therefore of acquiring the Sum received from the Insurance-office originate with the Bankrupt and his Wife. They divest themselves of all Dominion over it, by committing it to Trustees. It is extremely difficult to maintain that they, as Trustees, being allowed this Payment, are not to account for it as an Advantage

Advantage made of fiduciary Property, acquired partly by their own Act, and partly by the Act of the Bankrupt.

Having been thus enabled by the Act of the Bankrupt to obtain Part of their Debt, they cannot prove the Whole—they must account. Being allowed what they have expended, including the Premium, the Surplus must be deducted from the Proof.

1816.  
*Ex parte*  
**ANDREWS.**  
 —In the  
 Matter of  
**EMMETT.**

*Ex parte* MOODY. }  
*Ex parte* PRESTON. } —In the Matter of WARNE.

**JAMES Warne** bequeathed the Residue of his Property in the public Funds, and elsewhere, to *William Warne* and two other Persons (whom he named his Executors and Trustees), in Trust to pay the Dividends and Interest to the separate Use of his Niece *Sophia Moody* for Life, and after her Death, to divide it amongst her Children, and the Children of his Brother *Peter*.

The Testator died on the 20th of *April*, 1813.

*William Warne* alone proved the Will, and possessed himself of the clear Residue of the Property; being a

plication to the Commissioners), to a Legatee on Behalf of himself and others; with a Direction that the Dividends be paid into the Bank, in Trust in the Matter.

An Executor and Trustee having committed a Devastavit, precluded from proving under his Bankruptcy, and Liberty so to do given (in the first Instance, and without previous Ap-

Sum

1816.

*Ex parte*

MOODY.

*Ex parte*

PRESTON.

—In the  
Matter of

WARNE.

Sum of £1300, 3 per Cent. Consols, and £400 Arrear of Dividends.

In July 1815, *Warne* was declared a Bankrupt; and it was then discovered, that he had sold out the £1300, and had applied it, and also the £400, to his own Use.

The first Petition was presented by *Sophia Moody* and her Husband: and prayed, upon a Statement of these Circumstances, that they might be admitted to prove the Sum of £1300 Stock or its Value, and the Sum of £400.

This Application was made in the first Instance to the Court, and without their having tendered the Proof to the Commissioners.

It was therefore strongly urged by Mr. *Leach* and Mr. *Montagu*, that the Great Seal had not Jurisdiction to interfere, or, at least in Practice, never did in the first Instance interfere in a Question of Proof, which had not been previously submitted to the Judgment of the Commissioners. That this was not the Application of another Executor, or of one or more Legatees having the whole Interest: here nine other Persons (a) were interested: that the Bankrupt himself was, in *autre droit*, the Person entitled to prove (b).

Sir *Samuel Romilly* and Mr. *Blake*, relied upon the Case, *Ex parte Shakeshaft* (c) They urged the Injustice of permitting a Trustee who had dealt fraudulently with the Fund, to prove against his own Estate, and thus

(a) The Children of Mrs. *Moody* and the Testator's Brother. (b) *Cooke's B. L.* 150. (c) 3 *Brown's Rep.* 197. *Cooke's B. L.* 153.

attach to himself, under his own Bankruptcy, all the Privileges of a Creditor.

*The Vice CHANCELLOR*

Was of this Opinion: and was pleased to order, that the Petitioners should be at Liberty, for and on Behalf of themselves, and of all other Persons interested, to prove the Sum of £400, and also the Sum of £1300, \$ per Cent. consolidated Bank Annuities, such Proof to be made for the Value only of such Bank Annuities as they were of on the Day the Commission was awarded, with the Interest or Dividends due, or what would have become due to the Petitioners, or one of them, at the Bankruptcy, if the Stock had not been sold; and that the Dividends on such Proof be paid into the Bank, in the Name and with the Privity of the Accountant General, in Trust in this Matter, subject to the further Order of the Court, and the Order be entered with the Register of the Court of Chancery.

From this Order, in the Nature of an Appeal, the other Petition was presented by *Preston* and others; claiming under the Bequest to the Children of the Testator's Brother *Peter*; stating, that the former Petition had been presented without their Consent, and praying that the Order might be varied; and that the Bankrupt, as the Executor of the Testator, might be at Liberty to prove; or, at any Rate, if his Lordship should not think it right to vary the Order to that Extent, at least that the Proof of the *Moodies* might be confined to their own immediate Interest, and that of the Bankrupt be admitted for the Rest.

It was argued on the same Ground as before.

1816.

*Ex parte*

MOODY.

*Ex parte*

PRESTON.

—In the  
Matter of

WARNE.

*The*

1816.

*Ex parte*

MOODY.

*Ex parte*  
PRESTON.—In the  
Matter of  
WARNE.*The Lord CHANCELLOR.*

Lord *Thurlow* held, that an Executor having dealt fraudulently with the Fund, ought not himself to be permitted to prove; and when the important Consequences attached to a Proof, and its Influence in the Bankruptcy are considered, it would be most mischievous to permit him. The Practice was, causing a Claim to be entered, to refer it to the Master to appoint a proper Person to prove. If the Court can do this by Reference to the Master, it can, in the first Instance, and to save Circuity, make the Nomination; and I am sure, that again and again, a Legatee has been permitted to prove for himself and others, with a Direction that the Dividends be paid into the Bank. This Order must not be disturbed.

LINCOLN'S  
INN HALL,  
Aug. 1816.*Ex parte ROWLATT.*—In the Matter of ROW-  
LATT.Bond condi-  
tioned to be  
void, upon  
Payment of  
£3000 with In-

terest from the Death of the Obligor, and if the Obligor should perform his Covenant (for the Payment of an Annuity of £200) contained in an Indenture of Settlement.

*JOHN Rowlatt* the Bankrupt, executed a Bond to the Petitioners, *Charles Rowlatt* his Son, and *Octavius Mashiter*, in the penal Sum of £6000; conditioned to be void, if in the Event of an intended Marriage

The Annuity is in Arrear at the Bankruptcy, creating a Breach of the Condition of the Bond, to which the Certificate would be a Bar.

The Obligee, therefore, held entitled to prove under the Commission of the Obligor.

between

between *Charles Rowlatt* and *Ann Mashiter*, the Heirs &c. of *John Rowlatt*, should, at the End of three Calendar Months after his Decease, pay to the Petitioners, or the Survivor or the Executors, &c. the Sum of £3000 with Interest from the Death of *John Rowlatt* the elder, to be held upon the Trusts of a certain Indenture of Settlement, bearing even Date with the Bond:—and also, in the Event of the said intended Marriage, if *John Rowlatt* the elder, his Heirs, &c. should perform his Covenant in the said Indenture of Settlement contained, for Payment of an Annuity of £200 to the Petitioner *Charles Rowlatt*, in such Manner, and at such Times, as in the Settlement was mentioned.

That Indenture of Settlement, reciting that *William Rowlatt* had granted and conveyed to *John Rowlatt* and *Octavius Mashiter*, a certain Advowson upon Trust upon the Death of the then Incumbent, to present *Charles Rowlatt* to the Living, or in Case *Charles Rowlatt* should require it during the then Incumbency, to sell the Advowson, and to hold the Proceeds of the Sale in Trust for him, his Executors, &c.; and reciting the Bond, witnessed, that in Consideration of the Marriage, &c. the Trustees should stand possessed of the Monies to arise from the Sale of the Advowson, if sold, and of the £3000 secured by the Bond upon the Trusts declared in the Settlement. And *John Rowlatt*, his Heirs, &c. did thereby covenant with *Charles Rowlatt*, his Executors, &c. that in Case the Marriage should take Effect, he the said *John Rowlatt* would, from Time to Time, until *Charles Rowlatt* should become the actual Incumbent of the Living, or should be in the Enjoyment of some other ecclesiastical Preferment, which he might hold during his Life, of the yearly Value of £600; or until his, *Charles Rowlatt's* Death, pay to him an Annuity of £200: the first Payment to be made at the End of two Months after the Marriage.

The

1816.  
*Ex parte*  
 ROWLATT.  
 —In the  
 Matter of  
 ROWLATT.

1816.

*Ex parte*  
ROWLATT.

—In the  
Matter of  
ROWLATT.

The Marriage was solemnised. *Charles Rowlatt* had not become Incumbent of the Living, nor obtained any other Preferment. *John Rowlatt* became bankrupt.

The Annuity of £200 had been occasionally in Arrear: and there was, at the Bankruptcy, the Sum of £477 payable in Respect of it.

For this Arrear, the Petitioner *Charles Rowlatt*, tendered his Proof under the Commission; and he claimed also, that the Value of his Annuity should be ascertained, and a Proof admitted for that also: and he offered, in the Event of his becoming the Incumbent of the Living, or obtaining the ecclesiastical Preferment intended by the Settlement, to refund the Difference of Dividend resulting from the Value of Annuity, at the Time when his Preferment should attach. *Charles Rowlatt* and *Mashiter* also claimed to prove the £3000 secured by the Penalty of the Bond. These Claims had been rejected by the Commissioners, and against the Propriety of that Rejection, this Petition was presented.

Sir *Samuel Romilly* and Mr. *Swanston*, in Support of the Petition. *Charles Rowlatt* is an Annuitant; and, as such, is directly within the Statute 49 *Geo. III. c. 121. s. 17.* The Value of the Annuity may be ascertained. As to the Bond, it is sufficient to say, that it has become forfeited at Law. There is therefore a legal Debt; and upon that Basis, the Court is in the Habit of arranging the equitable Satisfaction. *Ex parte Groome*, 1 *Atk.* 115. *Ex parte Winchester*, *ibid.* 116. In the Matter of *Murphy*, 1 *Schoales* and *Lefroy*, 44, 50. *Butcher v. Churchill*, 14 *Ves.* 567 (a).

Mr. *Hart contra*, objected that the Bond could not

(a) The Cases are collected in *Cooke's B. L. Ch. VI.*

be

be said to be absolutely forfeited. It contained two Conditions; and as to one of them it was untouched, and within the Decisions in which it had been held, that a Proof could not be admitted, as in *Ex parte Barker (a)*, which was a Bond payable after the Decease of two Obligors, or the Survivor; and it was held not to be proveable. The other Condition of the present Bond, is merely the Subject of Damages, to be ascertained in an Action in which Breaches must be assigned by the Statute (b). As to the Annuity, that is altogether contingent, and cannot, upon any Principle, either of Proof or of Calculation, be admitted as a Debt.

1816.  
*Ex parte*  
 ROWLATT.  
 —In the  
 Matter of  
 ROWLATT.

*The Lord CHANCELLOR.*

This Petition raises an important Question. As Authorities for the Relief which it prays, the Cases *Ex parte Groome*, and *Ex parte Winchester*, have been relied on, as affording this Principle, that whatever be the Contingency, if the Penalty is forfeited, Equity will arrange the Proof, upon the Footing that there is a Debt at Law. In *Ex parte Winchester*, the Proof was permitted, because the Debt in Law had become absolute;—because it had not, in *Ex parte Groome*, the Proof was rejected; and in the Note which I have of that Case, Lord Hardwicke regrets the Necessity of proceeding upon a Distinction, which however he recognises as established.

This Case differs from all the others, in which there has been either a Judgment or Bond forfeited, either upon the Non-payment of a single Sum, or the Non-performance of a single Condition, as in *Ex parte Winchester*; there the Obligor had bound himself to pay, after the Decease of himself and his Wife, a Sum of £1000, with the Interest in the mean Time, and the Bond had become

(a) 9 Ves. 110.  
 VOL. II.

(b) 8 and 9 Wm. 3. c. 2. s. 8.  
 F F forfeited.



1816.  
*Ex parte*  
 ROWLATT.  
 —In the  
 Matter of  
 ROWLATT.

forfeited. *Ex parte Groome* was an Obligation to pay after the Death of the Covenantor, but stipulated for no Payment of Interest in the mean Time, and therefore, there could be no Breach antecedent to the Bankruptcy.

In the present Case, a Bond in £6000 is given for Payment of a Sum of £3000 after the Death of the Obligor, without Interest in the mean Time; but it is a Bond also for Payment of an Annuity of £200 a Year. The Obligor does not give a Bond to secure £3000, payable at his Death, with Interest in the mean Time, which would be the Case *Ex parte Winchester*; but he, in Effect, gives that which is more than the Interest of the £3000, £200 a Year. The £200 a Year not being duly paid, the Penalty has attached.

It does therefore appear to me, that there has been a Breach of one of the Conditions of this Bond, raising a Cause of Action, to which the Bankrupt's Certificate would be a Bar: if so, the Petitioner has a Right to a Proof. How that is to be ascertained, must be the Subject of further Consideration: in the mean Time, let the Claim be admitted.

Should the Parties be dissatisfied, I shall have no Difficulty in affording them the Opinion of a Court of Law, whether or not the Certificate would be a Bar.

*Ex*

LINCOLN'S  
INN HALL.  
*July, August,*  
1816.

*Ex parte* LORD.—In the Matter of STEVENS.

**T**HE Commission issued on the 20th of *February*, 1816. Debts to the Amount of £27,000 had been proved, and the Debts of the Creditors who had signed the Certificate did not exceed £16,700. The Petitioner resided in the Island of *New Providence*; his Debt amounted to £9,940. The Debts owing to the Petitioner and other Creditors, resident in the *Bahama* and *Bermuda* Islands, and in the *West* and *East Indies*, amounted to £17,000. The Amount of all the Debts, proved and unproved, was £87,000. The Bankrupt's last Examination took Place on the 20th of *April*, and the Certificate was signed on the 4th of *May*. The Petition was presented by *Lord* on the 27th of *May*, and stated the above Facts, and the Post-office Computation of Time required for communicating with the Places where the Creditors abroad resided, by which it appeared, that they had not had an Opportunity of proving their Debts; and the Prayer was, that the Certificate might be stayed, and that the Petitioner and other Creditors abroad might be at Liberty to prove, for the Purpose of assenting or dissenting.

Certificate stayed, that a Creditor whose Debt would turn it might have an Opportunity of assenting or dissenting.

A Creditor having the Bankrupt in Custody, and petitioning for Liberty to prove and stay the Certificate, must discharge the Bankrupt.

*Quære*, whether his presenting the Petition for that Purpose is not a Resort to the Commission within the 49 *Geo. 3. c. 121. s. 14.*

It was admitted that the Petitioner was now in *England*.

Mr. *Leach* and Mr. *Bickersteth* for the Petition, cited *Ex parte Saumerex*, 1 *Atk.* 84. *Ex parte Basarro*, 1 *Vol.* 266.

Sir *Samuel Romilly* for the Bankrupt, stated an Affi-

F F 2

davit;

1816.  
*Ex parte*  
 LORD.  
 —In the  
 Matter of  
 STEVENS.

davit; by which it appeared, that the Petitioner and the other Creditors abroad, had known of the embarrassed Situation of the Bankrupt's Affairs long before the Date of the Commission.

*The Lord CHANCELLOR,*

After observing that the Petitioner's Debt would turn the Certificate, said, that it must be sent back to the Commissioners.

Sir *Samuel Romilly* then stated from the Bankrupt's Affidavit, that he was in Prison in an Action brought by the Petitioner for the Recovery of the Debt sought to be proved, and he insisted, as of Right, that upon this Petition being granted, the Bankrupt ought to be discharged.

It was suggested, *contra*, that the Act of 49 *Geo.* 3. *c.* 121. s. 14. only compelled the Creditor to relinquish his Action, upon his proving or entering a Claim upon the Proceedings.

*The Lord CHANCELLOR.*

I cannot stay the Certificate, without having an Undertaking, that the Creditor who petitions will prove; and if he undertakes to prove, I must allow the Bankrupt the Benefit of the Act.

The Certificate was stayed, the Petitioner consenting that the Bankrupt should be discharged, and undertaking to prove his Debt.

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The Petitioner delayed signing the Consent for the Bankrupt's Discharge, and from that Circumstance, and the conditional Terms of the Order, he continued in Custody, and the Petitioner preferred a Charge for a Misdemeanour

meanour against him, under the 52 Geo. III. c. 63, and upon a Warrant granted on that Charge, he had been brought by the Gaoler before a Magistrate, and by him remanded.

Upon these Circumstances it was contended, that the Terms upon which the Certificate had been stayed had been evaded, and that it ought therefore to be allowed.

*The Lord CHANCELLOR.*

I cannot interfere to relieve the Bankrupt from the criminal Charge, but I ought to do something with Reference to Mr. Lord. The Power of the Chancellor in staying Certificates, is perhaps not very distinctly settled. The Enactment upon the Subject in 5 Geo. 2. is very short, and Lord *Hardwicke* (I do not say improperly) considered that the Power of Allowance enabled him to postpone the Certificate, where the Creditors were abroad (a). But perhaps strictly speaking, the Postponement ought to be made only at the Instance of Creditors who have proved, or have come in under the Commission. In this Case, it might very fairly be argued, that the Presentation of the Petition, was an Election to come in under the Commission, and, therefore, a Relinquishment of the Action, so as to induce the Court to interfere (b).

The Petition was directed to stand over, that Explanation might be given as to the Time when, and the Circumstances under which the criminal Charge had been made, and in the Result.

*The Lord CHANCELLOR*

Allowed the Certificate; being of Opinion, that the

(a) *Ex parte Saumeres*, 1 *Atk.* 1284. (b) *Ex parte Hardenbergh*, 1 Vol. 204.

Conduct

1816.

*Ex parte*  
LORD.

—In the  
Matter of  
STEVENS.

1816.

*Ex parte*

LORD.

—In the  
Matter of  
STEVENS.

Conduct of the Petitioner had been in Evasion of his Order, and in Contravention of the Terms upon which the Court had been induced to interfere.

LINCOLN'S

INN HALL.

Aug. 1816.

*Ex parte* GALLIMORE.—In the Matter of GALLIMORE.

A Man, whether Termor or Freeholder,

who sells

Bricks made from the Produce of his Soil, is not a Trader within the Bankrupt

**T**HIS was a Petition to supersede a Commission.

Laws: but he is, if he purchases the Materials of his Manufacture. From the Peculiarity of an Agreement in this Case, an Issue directed upon this Species of Trading.

Whether the Owner of a Colliery, borrowing a particular Species of Coal to render his own marketable, be a Trader, is a Question for a Jury upon the Intention.


Owner of a Colliery buying Articles, and selling them to his own Pitmen, not a Trader:—nor a Fisherman who buys occasionally Fish to make up for Market a Cargo, otherwise deficient.

Although all the Requisites of a Commission concur to its Validity, yet if taken out for an indirect and improper Object, (as a Landlord to determine a Lease, contrary to good Faith) it will be superseded.

How far a Landlord, issuing a Commission, may affect his Interest as Landlord in Competition with the Creditors—*Quære*.

on

on the following Conditions : namely, for every Statute Acre of Land, contained upon the said Premises, the Sum of £3 *per Annum* ; and for every Ton of *Bass Mine* Coals, got or sold, the Sum of 2s. ; for every Ton of *Peacock* and *Spencroft Mine* Coal, got or sold, the Sum of 2s. 5½*d.* ; and for every Ton of great Row, and Cannel Row under Coals, got or sold, the Sum of 2s. 9*d.* ; and also for every Ton of Half-yard Coal or Cannel, the Sum of 2s. 2*d.* ; and also, for every Ton of Marle, got and sold, the Sum of 8*d.* ; and also, for the Rent of Bricks sold, one Half of the Profit arising therefrom.

1816.  
  
*Ex parte*  
 GALLIMORE.  
 —In the  
 Matter of  
 GALLIMORE.

The Facts and the Arguments are so fully noticed in the Judgment, that no further introductory Statement is necessary.

Sir *Samuel Romilly*, Mr. *Cullen*, and Mr. *Bell*, supported the Petition.

Mr. *Leach*, Mr. *Cooke*, Mr. *Shadwell*, and Mr. *Wheatley*, opposed it.

*The Lord CHANCELLOR.*

First as to the Trading: and if there were nothing more of Particularity than what belongs to this Part of the Case, it appears to me, on examining the Papers, that first, whether he was a Brick-maker or not, in such a Sense as to be within the Bankrupt Laws, depends on some Circumstances in this Case, which do not occur in others. In one of the Cases, the Party is represented as buying the Materials, and carrying them to a Brick-kiln, and he was held to be a Trader. But it is admitted, if a Person make Bricks on his own Estate, and sell them, he is no Trader; and I cannot think there is any Difference, whether

1816.  
*Ex parte*  
 GALLIMORE.  
 —In the  
 Matter of  
 GALLIMORE.

whether or not he is a Termor or a Freeholder. For it is the same Species of Interest, but for a shorter Duration, and, therefore, the same Principle must apply (a). If, therefore, a Man only make a Profit of the Soil which he has as his own, and I do not know how to distinguish between an Owner in Fee, and an Owner for a Term of Years, my Inclination is to say, that he would not be a Trader within the Bankrupt Laws. But nice Distinctions have been taken in almost every Case which has occurred, and in those in which the Chancellor has taken upon himself to decide the Trading or no Trading, the Question has been Matter of fair Controversy on Affidavits. In this Case, looking at the Interpretation which has been put on the Agreement as to Brick-making, it appears to me, that there is a very special Question.

Secondly, as to the Trading in Coals. The Way in which that is made out is differently represented in the Affidavits on either Side. On the Part of the Person who seeks to have these Proceedings superseded, it is stated, that Mr. *Gallimore* was Tenant of Mr. *Wedgwood*, of certain Premises, and among others of a Coal Mine; and that, as such Tenant, he has only sold the Produce of his own Mine, except that he has been supplied from a neighbouring Colliery with Coals of a particular Denomination and Quality, which in its then present State, his own Mine did not afford him. That to keep his Customers attached to the Concern in which he was engaged, it became neces-

(a) *Port v. Turton*, 2 Wils. Cases in Cooke's B. L. Ch. 3. 172. *Ex parte Harrison*, 1 *Ex parte Ridge*, 1 Vol. 316. *Brown*, C. C. 173. *Parker v. trading as a Lime-burner. Wells*, 1 T. R. 34. 1 Bro. P. *Ex parte Gardner*, stone from C. 545. *Sutton v. Wceley*, a Quarry, *ibid.* 377. 7 East Rep. 442. See the

sary for him to borrow these Coals of another Quality and Nature, and he insists that the Engagement was, that when his own Mine was in a State to produce Coal of the same Species, he should return Coal for Coal; they, on the other Hand insisting, that such was not the Nature of the Engagement, but that he bought the Coals as he could get them, and sold them as his Customers applied:—in short, that he was a general Trader.

1816.  
*Ex parte*  
 GALLIMORE.  
 —In the  
 Matter of  
 GALLIMORE.

On the Circumstances thus stated, the Question upon this Trading would be difficult in Decision, without examining all those who make this Representation before a Jury. Whether the Owner of a Colliery, borrowing a particular Species of Coal to render his own marketable, was to be considered as a Person liable to Bankruptcy, depending in the Result, upon whether this was a mere incidental occasional Dealing, or manifested a Purpose of Trading in the Articles of other Persons.

There are a great many Cases, from which, attending to the Doctrines and Principles laid down in them, I think it would be difficult to support the present Commission, upon such a Trading. Take the Case of a Farmer in the West of *England*, who converts his Apples, the Fruits of his Orchard, into Cyder; and not having a sufficient Supply from his own Orchard, makes up the Deficiency *de Anno in Annum*, by purchasing Apples of his Neighbours. It has been held, that such a Buying would not make him a Bankrupt. Many other Cases of the same Kind might be put. In what Manner the Case stated by Mr. *Campbell* in his Report (a) was put by the learned Judge to the Jury, I am not at present informed; but if such a Case was to have been put by me to a Jury, I

(a) 1 Vol. 356. 3 *Camp.* 233.

should



1816.

*Ex parte*

GALLIMORE.

—In the  
Matter of  
GALLIMORE.

should have stated it thus:—If you are of Opinion that this Man resorted to the Coast of *Holland* to buy Fish, be the Acts of buying few or many, that would be enough to justify you in inferring that he was a Trader: I should think him a general Trader. But if the Case is no more than that of a Person who goes to Sea to fish, and not obtaining a sufficient Cargo by his fishing to supply the Markets, buys a few Fish to make up his Cargo, I should think it extremely difficult to say that such a partial Buying would amount to a general Trading. Such a Case as that is properly the Subject of a Trial at Law, and must always depend on its own Circumstances.

It is said, that if this Person is neither a Brick-maker nor a Coal-merchant, he was nevertheless a Huckster or Grocer; that he kept a Shop to supply Persons with Goods, such as Cheese, China, Bread, Butter, and all sorts of Articles; that he bought these on his own Credit, where he could purchase them, and sold them to all Persons who were willing to purchase them of him; and that having so done, though it was a small Concern, he was a Trader: for that a Man may be made a Bankrupt in Respect of a Dealing in a small Concern as well as in a large one. Here too the Representation differs so materially, that it would be impossible to decide upon this Part of the Case, without the Intervention of a Jury; for, if he did no more than buy small Articles to sell again to his own Pit-men, which is a very common Thing in the North, that certainly would not make him a Trader within the Bankrupt Laws.

If this were a Case which was to depend upon the Question whether these were or were not Acts of Trading, it would be impossible for any other Course to be adopted, than to direct Issues, whether all, or any of them, were  
Acts

Acts of Trading. But it is said, there are Peculiarities in it, which ought to preclude the putting it in that Course. It is said, that the Object of Mr. *Wedgwood* the petitioning Creditor, in making this Man a Bankrupt, is not to obtain his Debt in common with the other Creditors, by a Distribution of the Effects, but that he has taken out the Commission in order to possess himself of the Property of which he is the Landlord, and with no other View than to dispossess his Tenant of an extensive Colliery, rendered valuable by the Exertions of a few antecedent Years. It is represented, that Mr. *Wedgwood* intimated to Mr. *Gallimore*, that notwithstanding all the Conditions and Covenants in the Articles of Agreement between them, which called for Payment of a given Sum of Money as a Coal Rent, in Proportion to the Quantity of Coal procured, or as a dead Rent if none was procured, he would from Time to Time forbear calling upon him, (and did forbear calling on him) for Payment, till the Mine should be in such a State, that the Profits would enable him to pay the Rent. And it is represented, that Mr. *Gallimore*, in consequence of the great Advantage held out to him, by the Promise of this Forbearance, has been led into a vast Expense—that Expense ultimately rendering the Colliery valuable, and of the Colliery so rendered valuable, the Object of this Commission is to deprive him. It was contended, that this Court (that is, the Chancellor sitting in Bankruptcy) even supposing that such a Case was made out, would find it difficult to say that he had Authority to supersede a Commission under such Circumstances (a); that if these be all the Requisites that go to the Constitution of Bankruptcy, a Commission is the Right of the Creditor, and the Court cannot look at his Motives. I do not agree to this Proposition: it is the Duty of the Court to guard

1816.  
 Ex parte  
 GALLIMORE.  
 —In the  
 Matter of  
 GALLIMORE.

(a) *Ex parte Harcourt*, ante, 203.

against

1816.

*Ex parte*

GALLIMORE.

—In the  
Matter of  
GALLIMORE.

against its Process being abused, by being directed to the Attainment of Objects, for which it never was intended to be applicable; it is a Process which the Law authorises for the Purpose of obtaining a fair Distribution of the Bankrupt's Property among his Creditors, and no further authorises it, than as proceeding for that Purpose. I can well imagine a Case in which this Court would interfere. Suppose a Man let a Colliery to a Tenant, and having let that Colliery to him, he had permitted him to withhold the Payment of his Rent, with the Prospect that by such Sufferance and Forbearance, he would be enabled to bring the Colliery into that State of Perfection, that his Tenant would not only have the Benefit of it himself, but that in the End it would revert back to him in a high State of working; that he had permitted him to go on expending his whole Fortune, and withholding his Rent, and then, at last it should turn out, that there was no other Creditor but this Landlord, and that the Colliery, instead of being a losing Concern, supplied twenty or thirty thousand Tons of Coals annually:—supposing this to be the Case, would it not be most extraordinary, that the Court should permit the Landlord to say this,—Here is no Creditor to participate with me in the Profits of this Colliery, I have a Proviso, that if my Tenant become bankrupt, there should be an End of his Lease; and, acting upon this Principle, he makes a Demand suddenly upon his Tenant, which we know might be £20,000, and because his Tenant at a Moment's Notice is not able to pay him the £20,000, takes out a Commission in order to get the Lease into his own Hands, by the Ruin of his Tenant. Would the Court permit him to do this? I say it would not: for the Furtherance of such a Design, could not be the fair and legitimate Object of a Commission of Bankrupt. A Commission would be fraudulently taken out, if taken out with that View; and

I see

I see no Reason why the Process in Bankruptcy should not be affected by the same Species of Fraud, which would affect and set aside any other Process in any other Court.

Here, however, nothing is established which would justify me in saying that such a Case as that arises upon these Affidavits: and I cannot say, that if the Indulgence which a Landlord gives his Tenant, is an Indulgence which the Landlord finds has been abused (as in this Case it may have been represented to have been),—no Court can say, how much of Kindness is to restrain the Landlord from seeking Payment of his Money, by all legal Modes of Enforcement, provided there is no Engagement that goes the Length of restraining him. Nor can I say, that under the Circumstances of this Case, if Mr. *Wedgwood* was of Opinion that he could not get his Money without resorting to a Commission of Bankrupt, I have any Authority to set aside that Commission, if it can, in other Respects, be sustained. Under the Circumstances of the Case, I cannot do that, though under the Circumstances which the Bankrupt has represented, supposing them not to have been contradicted, I would not have it understood that the Court could not do it.

Whether the Object of Mr. *Wedgwood* being to get Possession of the Colliery, he will get Possession of it by Means of this Commission, is a Question I have nothing to do with. If it should happen that the Bankruptcy cannot be sustained on the Issues, it will follow of course, that he will not be able to get Possession of the Colliery, otherwise than by Operation of the Remedies which the Law gives him as Landlord. If, on the other Hand, the Bankruptcy can be sustained, it is questionable whether he will or will not get Possession of the Colliery. That will depend on various Circumstances. It will depend on whether

1816.  
*Ex parte*  
 GALLIMORE.  
 —In the  
 Matter of  
 GALLIMORE.

1816.

—

*Ex parte*

GALLIMORE.

—In the

Matter of

GALLIMORE.

whether his Remedy as Landlord will not be prejudiced by his own Interposition as Creditor (*a*); and supposing he is not to take his Remedy under the Commission of Bankrupt, whether this Lease will or will not be a Lease to be sold for the general Benefit of the Creditors of the Bankrupt, or whether Mr. *Wedgwood* can claim it, is a Question on which it is now necessary to say nothing.

Upon the Whole, I am of Opinion that the Question must be tried, whether this Person was a Trader as a Brick-maker, a Coal-dealer, or a Shop-keeper;—three distinct Issues.

(*a*) *Ex parte Wright*, in the Matter of *Shuttleworth*, *ante*, p. 244.

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### LOWNDES v. TAYLOR.

THE Decision in this Case, p. 365, has been affirmed upon Appeal, by the *Lord Chancellor*.

GUILDHALL.  
Sittings after  
*Hilary Term*,  
1816.

WARNER and Others, Assignees of PELLOW, v.  
BARBER.

THE Plaintiffs were the Assignees under a joint Commission against *Pellow* and his Partner.

Having

Having proved their Case, *Lens*, Serjeant, and *Campbell* for the Defendants, put in a separate Commission which had previously issued against one of the Partners, (which had not, however, been opened) and thereupon contended, that the Plaintiffs must be nonsuited.

GIBBS, C. J.

Was of Opinion, that the first separate Commission not having been opened, there was nothing to impede the vesting of the Property in the Assignees under the second, and the Plaintiffs had a Verdict.

1816.

WARNER  
and Others,  
Assignees of  
PELLOW,

v.

BARBER.



# ABSTRACT

OF

## CONTEMPORANEOUS CASES.

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SCOTT and ANOTHER v. AMBROSE.

3 Maule and Selwyn. Page 326 to 328.

1814.  
Monday,  
Nov. 28.

**T**HE Plaintiff sued the Defendant for a Debt, shortly after which a Commission issued against the Defendant, and he was found bankrupt. The Plaintiffs did not come in under the Commission, but prosecuted their Action to Judgment. The Defendant obtained his Certificate, and afterwards brought a Writ of Error in Parliament upon the Judgment, which Writ of Error was nonprossed for Want of Assignment of Errors, and £40 Costs of non pros. in Error were awarded against him. The Plaintiffs have issued a Fi. fa. for these Costs; a Rule Nisi was obtained for setting it aside.

Where Plaintiff sued Defendant for a Debt before the Bankruptcy of Defendant, and went on with the Suit after his Bankruptcy, and had Judgment, and Defendant obtained his Certificate, and afterwards brought a Writ of Error, which was non-prossed, and Costs of non pros. in Error awarded against him. Held that the Defendant was discharged by his Certificate from these Costs.

Marryat and Comyn now opposed the Rule, and distinguished these Costs from Costs in the Action, which they admitted had been treated in several Cases as Part of the original Debt, and as such barred by the Certificate (a). But these are Costs which have accrued in a Proceeding instituted after the Bankruptcy; which therefore constitute a new Debt. And they relied on *Ex parte Charles* (b); and *Walker v. Barnes* (c).

Lord ELLENBOROUGH, C.J.—The Decision in *Ex parte Charles*, with which I believe all the Courts in Westminster Hall have concurred, left untouched the Doctrine that the Costs shall bear Relation to the original Debt. In *Ex parte Charles* there was not any original Debt.

(a) See *Lewis v. Percy*, 1 H. Bl. 29. (b) Vol. I. 372, *Willett v. Pringle*, 2 N. R. 199.

(c) *Ante*, 379.



## CASES IN BANKRUPTCY.

1814.  
SCOTT and Another  
v. AMBROSE.

Here the Judgment of Affirmance in the House of Lords is equivalent to pronouncing Judgment in the original Terms, as if no such Writ of Error had been brought, and to that it adds the Costs of Affirmance.

LE BLANC, J.—In the Case cited from the Common Pleas, there was no prior Debt to which the Costs could be attached. Here there is a prior Debt.

BAYLEY, J.—I do not agree that Costs in Error are not like Costs in the Cause. Upon Judgment of non pros. in the House of Lords the Record is ordered to be remitted to this Court, that Execution may be had on the Judgment as if no Writ of Error had been brought, and Costs of the non pros. are awarded. The Execution which issues must be for the Whole; it is one entire Execution, and cannot be split for the Costs in Error alone, but must be for the Sum adjudged below, and also the Costs of Increase. The Distinction in *Ex parte Charles* has been pointed out, and the Case from the Common Pleas arose upon a Verdict for the Defendant, which brought it exactly to the Case of *Ex parte Charles*.

Per Curiam (a),

Rule absolute (b).

(a) Dampier was absent.

(b) See *Phillips v. Brown*, 6 T. R. 222.

1816.  
Wednesday, June 7.

## BARTLETT v. TUCHIN and ANOTHER.

1 Marshall, 583 to 585.

A Bankrupt's Estate is sold by Auction; the Purchaser, after having paid a Deposit, gives Notice that he means to abandon the Purchase, on a supposed Defect in the Title. The Commission is afterwards superseded, on the Ground that there was no good petitioning Creditor's Debt, and another Commission issues, and the same Assignees are chosen.

*Held*—That as the Assignees at the Time when they received Notice from the Purchaser had not a good Title to the Estate, they could not enforce the Contract, nor consequently retain the Deposit.

try

try the Validity of the Commission, in which he recovered on the Ground, that the petitioning Creditor's Debt did not become due till after the Commission had issued, and the Commission was accordingly superseded on the 3d March, 1814. On the 1st of February, 1814, the Plaintiff, in Consequence of a supposed Defect in the Title, had written to the Defendants and likewise to the Assignees, stating that he abandoned the Purchase, and requiring an immediate Return of the Deposit; the Assignees, however, insisted that the Contract should be completed. On the 4th of March, 1814, a second Commission issued, on which Price was again declared bankrupt, and on the 22d of March, 1814, the same Persons were chosen Assignees under the second Commission.—The Question for the Opinion of the Court was, whether, as the first Commission had been superseded, the Assignees could enforce the Contract against the Plaintiff, and consequently whether they were entitled to retain the Deposit, for which this Action was brought (a).

1815.  
BARTLETT v.  
TUCHIN and  
Another.

Mr. Serjt. BEST, on the Part of the Plaintiff, was stopped by the Court; who called on the Defendant's Counsel to go on.

Mr. Serjt. COPLEY accordingly observed, that the same Persons had been chosen Assignees under the second Commission as under the first, that no precise Time had been fixed for completing the Transaction, and that it would have been sufficient if a good Title had been made out, though after Action brought. He contended that on the 1st of February, when the Plaintiff renounced his Purchase, the Assignees had the legal Estate, for the Commission had not then been superseded.

Lord C. J. GIBBS.—The Assignees could not then have proved a petitioning Creditor's Debt, and without that they could not have made out a good Title. If the Plaintiff had brought this Action at the Time when he gave Notice that he should abandon his Purchase, he would have been entitled to a Verdict, for the Assignees were not then in a Condition to support their Contract.

The Rest of the Court concurred.

Judgment for the Plaintiff.

(a) A Verdict had been found for the Plaintiff, subject to the Opinion of the Court on the above Case.

1815.

Feb. 5.

## PRICE against NIXON.

5th Taunton, Pages 338 and 339.

Upon a Sale of Goods at six or nine Months Credit, the Purchaser, by not paying at the End of six Months, makes his Election to take Credit for the nine Months, and there is no Debt to support a Commission of Bankrupt till the nine Months are expired.

**T**ROVER against the Messenger to try the Validity of a Commission which had issued against the Plaintiff. The Case turned on the Petitioning Creditor's Debt. The Plaintiff had applied to them to furnish Cordage for a Barge, and asked them what was their usual Time of Credit. They answered, that to Persons whom they knew they gave twelve Months, to others six or nine Months: the Plaintiff answered, that six or nine Months would do for him: and the Goods were furnished. Upon the Trial the Jury found a Verdict for the Plaintiff.

Upon a Rule Nisi to set aside the Verdict, and have a new Trial,

CHAMBER, J. The Meaning of the Plaintiff's Language is "six Months may do for me, nine Months will certainly do."

DALLAS, J. The Plaintiff takes the Right of electing. By not paying at the End of six Months, he makes his Election not to pay till the End of nine Months.

Rule discharged.

1811.

July 17.

## HIAMS, Ex parte.

18 Vesey, 237 to 246.

Commitment by Commissioners of Bankruptcy, for an unsatisfactory Answer of the Bankrupt, illegal: the Recital of

the previous Examination not correctly stating the Admissions upon which the Question was founded.

Re-examination directed: the Bankrupt being in Custody also under a Surrender by his Bail.

Whether a Person committed by Commissioners of Bankrupt, can be discharged on Petition without a Habeas Corpus, quære.

**T**HIS Petition presented by a Bankrupt, prayed that the Petitioner might be discharged from Imprisonment, under a Commitment by the Commissioners, or that the Question upon which he was committed might be put in a Form more simple. The Bankrupt was

committed

committed for not fully answering to the Satisfaction of the Commissioners the following Question (a):

1811.  
HIAMS,  
Ex parte.

“ As you admit that you have received Goods within the last eighteen Months to the Amount of £ 14000; that you have suffered a Loss and incurred Expenses with Respect to those Goods to the Amount of about £ 900, as detailed in the Schedule C; that you have no Books or Papers relating to the Losses so stated in the Schedule C, except the Invoices of the Purchases of those Goods; that you have never kept any Books of Account, except some little Memorandum Books which have been destroyed; that a Part of the Goods upon which the Loss had been sustained had been sold Abroad by Auction, the Accounts of which Sales, you formerly stated, you carried to the Continent, and destroyed them in an Enemy's Country, at the same Time giving as a Reason for taking them to the Continent with you, that they would assist your Judgment in selling the Goods you had then with you; but upon being further asked respecting those Accounts, you stated that you brought them to England, and that they must have been destroyed when the Sheriff took possession of your House; but upon being asked whether you had the least Reason to suspect or believe that such Accounts had been destroyed by any Person acting under the Sheriff, you stated, that your Reason was that you did not find them when you came from Abroad; that you gave no particular Directions about them; that you did not enquire whether they had been destroyed by the Sheriff's Officer, or any other Person”—Have you now any Account to give respecting those Sales?

Answer. No; no other Account; but the only Papers I brought Home the second Time, which was the latter End of March, or the Beginning of April, were the Papers about the Goods sold by Auction.

The Bankrupt, by his Affidavit, stated, that if the Question had been divided, he should have answered, and went into an explanatory Statement of the Circumstances enquired into.

The Lord CHANCELLOR.

This Case is in the narrowest Compass. Whether the Commitment was proper, depends upon the Point, whether the Admissions assumed in the Recital are correct. If the Question was proper, and the Answer satisfactory, the Bankrupt is entitled to his Discharge in some Form; but the Commissioners having this Sort of Authority expressly given them by the Act of Parliament, a Doubt has been handed down

(a) This Question was a Recapitulation of what had been stated by the Bankrupt on a former, and on his then Examination; his former Examination had been partly taken in private: in that Case the Examination is read to the Creditors at the public Meeting

1811.  
HAMS,  
Ex parte.

by Tradition, whether the Lord Chancellor, by that Authority which he has in Bankruptcy, can deal with the Commitment, as he, as Lord Chancellor, and the Judges, can upon the Return to a Habeas Corpus: and I find upon Enquiry at the Office, that for the last twenty-seven Years this Sort of Interference has been uniformly refused. The Difficulty when started has been avoided, by taking the other Course not open to Objection; and in some Instances it has been found salutary to send it again to the Commissioners to be reviewed: the Lord Chancellor not dealing directly with the Commitment; but by his Advice and Order impressing upon the Commissioners the Expediency of reconsidering whether they were perfectly right in the Exercise of their Authority (a). In the View I have taken of this Case, I cannot reach the Conclusion, that if the Truth of the Assertions contained in the Preface to this Question can be established, the Question was improper. I perfectly understand it, and the Drift of the Commissioners in putting it; and the fairest Way of putting it seems to be this, with a Recital summing up the previous Examination. Supposing therefore those Assertions to be true, I could not discharge upon a Habeas Corpus.

Considering the Nature of these Questions, and of the Evidence given by himself, I am not sure that I could safely conclude that he had, as he says, made those Admissions. His Evidence, inconsistent and unsatisfactory as it is, does not appear to me to be so represented in these prefatory Admissions, as to form the Foundation of a Commitment. I do not think that he has so predicated as is asserted, with Respect to all the Papers. It is not quite clear, that if the Questions and Answers were distinctly stated to him, he might not reconcile them; that the Result would not be, that some Papers were destroyed on the Continent; and some relating to the Transactions of March were brought over here and lost; a Conclusion which receives Countenance from his Answer as to the Mistake.

Under a Persuasion that the Commissioners meant to do their Duty, I propose to intimate to them, which will be sufficient without an Order, that they should review this Case, and re-examine the Bankrupt forthwith; but if pressed to discharge him, doubting whether I can upon Petition, I will have that ascertained: and if the Writ of Habeas Corpus should be necessary, I will issue it immediately.

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The Bankrupt having been surrendered by his Bail, the Question as to discharging him was therefore immaterial.

(a) Oliver's Case, 1 Vol. 407.

COOKE v. MARSH.

1811.

August 2d.

18 Vesey, 209 to 211.

**A** PETITION to supersede a Commission of Bankruptcy having been ordered to stand over, with Liberty to bring an Action to ascertain the Existence of a Partnership, a Production of all Papers, &c. and the Bankruptcy not to be set up, a Bill of Discovery was filed; to which a Demurrer was put in.

After an Order in Bankruptcy, for Liberty to bring an Action, with special Directions for a Production of Papers, and not to set up the Bankruptcy; a Bill of Discovery cannot be filed.

The Lord CHANCELLOR.

The single Question is, whether adopting the Form of an Action instead of an Issue, I could mean to give an Opening to Inconveniences which in an Issue could not possibly occur. Take the ordinary Case of a Petition presented by a Bankrupt, and an Order permitting him to bring an Action, and the Petition to stand over; was there ever an Instance of filing a Bill of Discovery without Leave? and could I in Chancery grant an Injunction against a Proceeding at Law, ordered by me in Bankruptcy? I did not leave this Case liable to the Incidents of a common Action: ordering a Production of Papers both in the Master's Office, and at the Trial; and upon a Petition stating, that the Order for that Production had been defeated by a Trick, I should order it to be tried again, though it was put in the Form of an Action. If this Bill can be sustained, it would be impossible to proceed upon a Petition in Bankruptcy; which might be suspended during all the Proceedings in a Cause here, and upon Appeal to the House of Lords. There might be a Case in Bankruptcy, in which I might direct a Bill of Discovery to be filed, or these very Interrogatories to be answered; but, considering the Consequences, I cannot conceive how the Jurisdictions can go on longer; and therefore must stop the Proceedings upon this Bill.

BAKER, Ex parte.

Aug. 22.

18 Vesey, 246, 247.

**I**NTEREST was pressed against the Assignee, under a Commission of Bankruptcy, as being a Partner in a Country Bank, into which

Assignee in Bankruptcy charged with Interest, not as

Partner in the Bank into which the Money was paid by Direction of the Creditors, but for keeping it there too long

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1811.  
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**BAKER,**  
*Ex parte.*

the Money was paid by the Appointment of the Creditors, and remained there three Years.

*The Lord CHANCELLOR.*

The Assignee resists the Claim of Interest, on the Ground that the Money really is where the Creditors directed it to be; and though, as a general Regulation, it may be prudent in Creditors never to order their Money to be paid into a Bank, in which an Assignee is a Partner; yet, if they do, it will be too much to say, he shall be charged with Interest, merely on the Ground, that he has, as a Banker, that Possession which the Creditors have sanctioned.

Here, however, the Assignee is bound to use as much Expedition for the Benefit of the Creditors, by taking the Money out of his own Hands, as if it was in any other Bank. He has, in Fact, been making a Profit at five per Cent. about three Years; and gives no satisfactory Reason for keeping it so long. On that Ground, therefore, being an Assignee, he must account with Interest, to be computed upon the annual Balance.

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**TAYLOR, Ex parte (a).**

July 25.

18 Vesey, 284.

Order for joint Creditors to vote in the Choice of Assignees under a separate Commission of Bankruptcy; the petitioning Creditor, a joint Creditor, whose Debt overbalanced the separate Debts, consenting.

**THIS** Petition prayed, that joint Creditors might be permitted to vote in the Choice of Assignees, under a separate Commission of Bankruptcy, issued upon a joint Debt for £1000. The separate Debts were inconsiderable, being greatly overbalanced by the single Debt of the petitioning Creditor, who consented to the Application.

The Lord Chancellor, with some Difficulty, made the Order; directing it to recite, that it appeared from the State of the Proofs that the petitioning Creditor's Debt over-balanced the separate Debts.

(a) *Ex Relahone.* Vide *Ex parte Simpson*, in the *Matter of Ashton*, *ante*, p. 237.

COHEN.

COHEN, *Ex parte* (a).

18 Vesey, 294.

1811.

August 22.

**A** BANKRUPT under Commitment, for not answering to the Satisfaction of the Commissioners, applied to be brought before them again; but the Assignees refusing, unless he would pay the Expenses of the Meeting, he applied to the Lord Chancellor.

Order on Application of a Bankrupt committed, to bring him again before the Commissioners; if no Effects, the Fees to be paid out of future Effects, if any.

The Lord Chancellor directed, that if there were no Effects, the Commissioners should meet gratis; receiving their Fees out of future Effects, if there should be any; adding, that if he should be again committed for not answering fully, he would find it very difficult to obtain another Order to bring him up.

If recommitted, he would find it difficult to obtain another Order.

(a) *Ex Relatione.*

MASTERMAN, *Ex parte.*

18 Vesey, 298, 299.

Nov. 9.

**T**HE Petitioner sued out a Commission of Bankruptcy a Year ago: but upon an Agreement for a Composition, the Commission was not prosecuted. The Debtor having failed in paying some of the Instalments under the Composition, the Petitioner applied to strike a Docket for another Commission; but an Objection was taken in the Bankrupt Office, upon a Practice founded upon an Order (a), alleged to have been made by Lord Thurlow, and acted upon, that a petitioning Creditor, who neglected to prosecute the Commission within the limited Time, should not sue out another Commission without special Leave.

Order by Lord Thurlow, that a petitioning Creditor, who has neglected to prosecute a Commission of Bankruptcy, shall not have another.

(a) This Order is mentioned in Mr. Elley's collection of Orders in Bankruptcy, as a Direction by Lord Thurlow, 6th December, 1786, to the Secretary of Bankruptcy, upon the Petition of Sir Richard Arkwright, in the Bankruptcy of Gibson and Johnson, invariably acted upon by the Secretary.

The



1811

*The Lord CHANCELLOR.*MASTERMAN,  
Ex parte.

Practice of striking  
a Docket, for the  
Purpose, not of a  
Commission of Bank-  
ruptcy, but of com-  
pelling a Composition,  
disapproved, and not  
aided.

This seems to me precisely the State of Facts, to which Lord Thurlow's intended Order was to be applied. I will make no Order on this Application. If you are entitled, under your Interpretation of that Order, to the Commission, you do not want my Leave: If you are not so entitled, I will not give you Leave: as I do not approve this Use of a Commission of Bankruptcy, to grind an unfortunate Man, and will give no Assistance to such a Purpose.

1811.  
Nov. 9.

LANGDALE Ex parte.

18 Vesey, Page 300 to 301.

Partnership by  
Agreement, for a  
Participation in  
Profits, or their Ap-  
plication.

**T**HE Bankrupt had kept a Canteen in the Neighbourhood of some Barracks, and the Question upon the Petition of the Assignees was, whether the Brewers who supplied him with Beer were to be considered as Partners. According to their Representation, they were to pay half his Rent, supplying him with Beer at £4. 5s. per Barrel, the usual Price being £3. 8s. The Bankrupt's Account of Agreement was, that the Brewers were to have out of the Profits 17s. per Barrel for the Half of the Rent; the Bankrupt taking the Rest, of which 5s. was for drawing the Beer, and 1s. for collecting the Money.

*The Lord CHANCELLOR.*

Partnership without  
Participation of Profit,  
by lending his Name,  
though contracting  
that he shall suffer no  
Loss.

A Man who is to have no Profit may be a Partner, if holding himself out as such, as by lending his Name. He may also be a Partner when the Contract is that he shall suffer no Loss; and it is not the less a Partnership, because Part of the Contract is, that they are not to suffer by bad Debts, the personal Negligence of him who has the Custody of the Article, by Fire, &c. The true Criterion is, whether they are to participate in Profit. That has been the Question ever since the Case of Groves v. Smith.

I cannot refuse to let this Case go to a Jury. The Agreement to sell their Beer to him at a higher Price than to others, would not make them Partners: but the Bankrupt's Representation is so different that it is impossible to determine without the Decision of a Jury upon the Question, whether this was an Agreement for a Division

sion of the Profits, or the Brewer stood only in the Relation of Vendors of the Beer to this Retailer, at £4. 5s. per Barrel, in Consideration of paying half his Rent, selling to others at £3. 8s. If the actual Contract gave a Claim upon the Profits or the Application of them, that is Partnership: if there was no Claim upon the Profits, or the Application of the Profits, then it is no Partnership.

1811.  
LANGDALE,  
Ex parte.

An Issue was directed.

WILKINSON v. WILKINSON.

ROLLS,  
June 6, 1816.

Cooper's Cases, 259. 261.

**J**OSHUA Wilkinson by his Will, gave an Annuity of £500 to his Wife, and also gave Annuities of £50 a Year to each of his Daughters, and the remaining Rents and Profits of his leasehold Premises to his Son John Henry Wilkinson, and also a Provision to his other Son William Wilkinson: and then followed this Clause: "Provided always that the Annuity of £500 before given to my said dear Wife for her Life; and the Provision I have made for my said Daughters for their respective Use; and the Estates given to my said Son, for their Lives, is, and are upon this express Condition, that in Case they my said Wife, Sons, and Daughters, shall respectively assign or dispose of, or otherwise charge or incumber the Life Estates, Annuities and Provisions so made to and for them, during their respective Lives as aforesaid, so as not to be entitled to the personal Receipt, Use, and Enjoyment thereof, then and from thenceforth the Annuity or Life Estate or Interest of him, her, or them respectively so doing or attempting so to do, shall from thenceforth cease, determine, and be void to all Intents and Purposes whatsoever, and shall immediately thereupon descend to and devolve upon the Person or Persons who shall be next entitled thereto, by Virtue of the Limitation aforesaid, in such Manner as the same would have done in Case he, she, or they, was or were then respectively actually dead, any Thing herein contained to the contrary notwithstanding."

Bankruptcy not  
a Forfeiture under a  
Clause in a Will,  
against Alienation.

The Master of the ROLLS.

The Question is, whether the Testator has expressed an Intention  
of

1815.  
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 WILKINSON  
 v.  
 WILKINSON.

of taking away the Life Estate which he had given to his Son, upon the Bankruptcy of that Son. Now Courts of Law have held (a), that an Assignment by Operation of Law, which Bankruptcy is, is not an Alienation, within the Meaning of a Restraint against Alienation. If so, the Testator's Son has not alienated, so as to forfeit his Estate under the Will. As to the Testator having intended a personal Enjoyment by his Son only of this Property, he probably did so; but he has not expressed himself in such a Manner upon that Subject, as that I am prepared to say his Interest ceased by what has taken Place.

(a) Brandon v. Robinson, 1 Vol. 108. Doe on Demise of Nicholson v. Carter, 3 T. R. 57. Dommet v. Bedford, 66 T. R. 684. Shae v. Hale, 13 Ves. 404.

Ex parte TOPHAM.

Maddocks's Reports of Cases in the Vice-Chancellor's Court. Vol. I.  
 Page 38.

No Authority in Bankruptcy, on Petition of equitable Mortgagee, by Deposit of Deeds, to order Sale of the Estate, where there is a subsequent Mortgagee of the Equity of Redemption, who objects, and has not proved under the Commission, the proper Remedy being by Bill.

**T**HIS was a Petition for the usual Order for Sale, on Behalf of an equitable Mortgagee, and that he might come in under the Commission for the Deficiency. The Deposit was made in January, 1812. Afterwards the Bankrupt agreed to sell the Estate to a Mr. Ward; received the Purchase Money, and let Mr. Ward into Possession; but did not execute a Conveyance.

Mr. Horne opposed it on Behalf of Ward, who refused to consent to a Sale, and had not proved under the Commission.

The VICE-CHANCELLOR.

This is a proper Case for a Bill. Even in the Case of a legal Mortgage, the Commissioners are not authorized to order a Sale, unless the Bankrupt has the Equity of Redemption.

Vide Ex parte Jackson, 3 Ves. 357. 2 Vol. Christian's Bankrupt Law, 323, 324.

Ex parte

Ex parte BURT.

1 Maddocks, 46, 48.

**A**N Order for an Enquiry before Commissioners to try whether a Debt proved was usurious, merely on a Deposition of the Bankrupt as to the Usury refused.

Vide ex parte Campbell in the Matter of Bromer, ante, 61.

Ex parte ALDERSON and ANOTHER.

1 Maddocks, 53. 55.

1816.

14th August

**J**ANE Row became indebted to the Petitioners in £525; and being a Creditor of the Estate of John Fish deceased, gave them a Draft on the Executor as follows:

Please pay Messrs. G. and T. Alderson, or Order, four Hundred and seventeen Pounds, six Shillings, as Part of the Amount due to me for Plumbers' Work done for the late John Fish, Esq.

Jane Row.

A Draft on the Executor of a Creditor, which the Executor promised to discharge on his receiving Assets, is an equitable Assignment of the Debt available against Assignees in Bankruptcy.

The Petitioners presented the Draft to the Executor; but he, not being prepared with Assets, did not accept it, but retained it to be paid when there should be Funds.

The VICE-CHANCELLOR.

This is a good equitable Assignment: the Executor bound himself to pay when in Possession of Assets (a).

(a) Yeate v. Groves, 1 Ves. jun. 280.

Ex parte

1816.

18th August,

Ex parte HILL.

1 Maddocks, 61 to 67.

Where Ship sailed with Ballast from London to Jamaica, and was sold on her Voyage there, and afterwards sailed from Jamaica to London, with Goods shipped on a Contract with the Owners of the Ship, at the Time of the shipping, the Creditors of quondam Owners have no Lien on the Freight due, in Respect of the Voyage from Jamaica.

**I**N January 1811, Messrs. Oliver and Townsend, Mr. J. Jones, and Mr. R. Marks, were joint Owners of the Ship *Louisa*. It was agreed between them that the Ship should proceed to the West Indies, in Order to bring a Cargo or Freight back; and accordingly, the Ship sailed with Jones as Master. Previous to the Sailing of the Ship, the Petitioners Hill and Sons repaired the same, and their Bill amounted to £327 15s. 6d. The Petitioner Thomas Carless made several Insurances on the Ship for the Voyage, on the joint Account of the Owners, and several Persons furnished Stores and Provisions for the Outfit. During the Absence of the Ship on her Voyage, Oliver, Townsend, and Marks agreed with James Croft to sell to him twelve Sixteenths of the Ship; and a Bill of Sale was executed, dated 23d January, 1812, and the Transfer was completed on the Register on the 27th June, 1812. Oliver and Townsend were declared Bankrupts. The Ship arrived at Jamaica later than was expected; and the Cargo which was intended for her was delivered to another Ship; but the Persons to whom the Ship had been sent proposed to John Jones, that if he would go on a Voyage with the Ship to New Brunswick and back on Freight, they would provide a Cargo for the Ship, on Freight from Jamaica to London. The Ship accordingly sailed to New Brunswick and back, and then the Ship, with the Cargo provided for it, returned to London in June 1812, and remained in the Hands of John Jones on Account of Freight earned, amounting to £1451 8s. 4d. John Jones had since become bankrupt. The Petitioners submitted they were entitled to have the said Sum of £1451 8s. 4d. applied towards the Discharge of their Debts.

Sir Samuel Romilly and Mr. Bell for the Petition.

Oliver and Co. though they might sell the Ship whilst on its Voyage, could not transfer the Profits arising from the Freight which she was earning, so as to disappoint these Creditors. The present Owners not being Owners when the Ship was fitted out, the Creditors can have no Claim on them. There was certainly (a) no Lien on the Ship; but the Register Acts do not affect this Point.

Mr. Hart and Mr. Cullen against the Petition.

(a) Ex parte Harrison, ante, 78. Ex parte Young, *ibid.* in Notes.

The Freight belongs to the Owners of the Ship, and we are the Owners. The Creditors outfitting the Ship had no Lien on the Ship, and it would be singular to hold they have a Claim on the Freight earned by the Ship after the Sale. It is only earned when the Ship arrives at the Port of Delivery.

1815.  
Ex parte HILL.

The VICE-CHANCELLOR.

It is clear these Petitioners have no Lien on the Ship; and if no Freight had been earned, their only Relief could have been against the original Owners who employed them. The Creditors would have had no Lien on the Ship, because that was not joint Property; but the Earnings of the Ship would have been joint Property, and liable to the joint Creditors;—not from any Doctrine peculiar to the Earnings of a Ship, but on the general Principle applicable to the joint Property of every Partnership. Is then this Freight the joint Property of Oliver and Co.? It arose out of a Contract by the Owners of the Goods shipped at Jamaica with the then Owners of the Ship, Croft and Jones. Those Owners might have refused to have taken the Goods, or might have agreed to take them to any other Country. They had an entire and exclusive Dominion over the Ship: no Part of the Freight belonged to the original Owners. Having determined in whom is the Property of the Freight, the Question is decided.

Petition dismissed.

Ex parte POWELL.

1815.  
August 16.

1 Maddocks, 68. 72.

**I**N 1804, a Commission issued against Samuel Castell, and Walter Powell, and they were declared Bankrupts; distinct Accounts were kept of their joint and separate Estates.

The joint Estate paid a Dividend of eleven Shillings and Six-pence in the Pound (a), and Powell's separate Estate paid four Shillings in the Pound, and he obtained his Certificate. Castell's separate Estate paid a Dividend of one Shilling and Nine-pence in the Pound, and he died without having obtained his Certificate; and the surviving Assign-

Bankrupt under a joint Commission not entitled to an Allowance, though joint Estate pays ten Shillings in the Pound, unless both joint and separate Creditors who have proved are paid ten Shillings in the Pound. If one Partner only

has obtained his Certificate, no Allowance given to the Partner who has obtained his Certificate, the Allowance being only jointly claimable.

(a) It was said at the Bar, and admitted, that twelve Shillings and Six-pence in the Pound had been paid by the joint Estate.

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1815.  
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*Ex parte*  
 POWELL.

nees were about to declare and pay a final Dividend of the joint and separate Estates, without paying to, or reserving for the Petitioner, any Allowance in Respect thereof. The Petition prayed that the Assignees might be directed to pay to the Petitioner the Whole of the Allowance in Respect of the Dividends paid, and to be paid, out of the joint Estate.

**The VICE-CHANCELLOR.**

Two Questions arise: 1. Is an Allowance claimable under the Act of Parliament (a), where the separate Creditors under the joint Commission are not paid ten Shillings in the Pound? 2. Where, under a joint Commission, ten Shillings in the Pound have been paid, and one of the Bankrupts has obtained his Certificate, and the other has not, can the Bankrupt, who has obtained his Certificate, claim any and what Allowance, the Whole or a Part? The Act of Parliament (b) makes the Criterion of the Allowance to be, not an honest Disclosure, but the Quantum of the Estate, and the Quantum of the Debts. The Statute says, there must be so much-paid "to all the Creditors that have proved." *Ex parte Bates* (c) shews, that for the Purpose of the Allowance, both the separate and the joint Estate are to be considered, and that both contribute to the Payment of it. All Persons who have proved Debts, whether joint or separate, must be paid ten Shillings in the Pound, before the Bankrupts are entitled to an Allowance. Here, the separate Creditors have not been paid ten Shillings in the Pound; and if all the joint and separate Estate be put together, and all the joint and separate Debts, ten Shillings in the Pound would not be paid to the joint and separate Creditors.

The whole of the 5 per Cent. Allowance must be given or none. One of two Partners cannot claim the Allowance. Though the joint and separate Creditors are paid ten Shillings in the Pound, yet, if one of the Bankrupts has not obtained his Certificate, he who has, cannot claim an Allowance: they must take together, or not at all. *Bates's* Case has decided that the Allowance is entire.

Petition dismissed.

(a) 5 Geo. 2. c. 30. s. 7.

(b) *Ibid.*

(c) *Vide Ex parte Farlow*, 1 Vol. 421. *Ex parte Holmes*, ante, 26.

Ex parte IRVINE.

1815.  
August 17.

1 Maddock, 74, 75.

VICE-CHANCELLOR.

Creditors apply to supersede a second Commission against  
inrupt, Notice must be given to the Assignees under the  
ission. such appears to be the Course of the Court. It was  
Ex parte Rhodes (a), and very lately, I understand, the  
has adhered to this Rule.

Petition to supersede  
a second Commission  
must be served on  
the Assignees under  
the first.

(a) 15 Ves. 542.

Ex parte WESTON.

1815.  
August 18.

1 Maddock, 75.

nkrupt Petition in this Case was not signed by the Solicitor  
cted by the general Order of the 12th August, 1809, but by  
ho was Agent of the Solicitor (a). The hearing of the Peti-  
jected to on this Ground, and the Vice Chancellor thought  
on well-founded, and that the Petition must stand over till  
gned; but the Attorney and the Petitioner being in Court,  
permitted to sign the Petition, and the Objection was then  
as obviated.

Bankrupt Petition  
witnessed by the  
Agent of the Attorney  
who presented the  
Petition, not a suf-  
ficient Compliance  
with the general Or-  
der, requiring the  
Attestation of Attorney  
who presents the  
Petition.

2th August, 1809. Ex parte Rodbud, in the Matter of Titley, ante, 82.

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Ex parte



## CASES IN BANKRUPTCY.

Ex parte CLUNES.

1 Maddock, 76. 78.

1815.

August 19.

Order upon Assignees, under 49 Geo. 3. c. 121. s. 19. to deliver up Possession, and execute an Assignment, or Surrender of the Bankrupt's Benefit in a Lease, where the Lease itself had been deposited in the Hands of a third Person as a Security.

**T**HIS was a Petition by a Landlord (a), praying that the Assignees might be ordered to accept a Lease to the Bankrupt from the Petitioner, or to deliver up the same, and the Possession of the Premises to the Petitioner. The Affidavits in Support of the Petition, stated, that the Assignees had declined the Lease. Affidavits on the Part of the Assignees were adduced to prove that they did not mean to take the Lease.

The Lease had been deposited by the Bankrupt as Security for a Debt.

The VICE-CHANCELLOR.

Though the Act does not in Words extend to Cases where the Lease is in the Hands of a third Person, yet, I think, by an equitable Construction of this Act, which was intended for the Benefit of Landlords, I have Jurisdiction. If the Assignees have accepted the Lease, or have declined it, I have no Jurisdiction; it is only when Assignees will not decide, that a Jurisdiction is given.

Considering this as a Case where the Assignees have suspended their Decision, I shall direct that the Assignees deliver up Possession of the House to the Petitioner, and execute an Assignment or Surrender of the Bankrupt's Benefit in the Lease.

(a) 49 Geo. III. c. 121. s. 19.

Ex parte CUTHBERT.

1 Maddock, 78. 80.

1815.

August 21.

Attorney under the Circumstances ordered to pay the Costs of an improper Petition in Bankruptcy.

**N**O Grounds appearing in Support of the Petition, the Question was, who should pay the Costs?

The VICE-CHANCELLOR.

This unfounded Petition appears to have arisen out of the interested Views of the Attorney.

The

## CASES IN BANKRUPTCY.

453

The Petition, therefore, must be dismissed, and the Costs of it paid by the Attorney.

1815.  
Ex parte  
CUTHBERT.

Ex parte EMMETT.

1814.  
11th November.

1 Maddock, 111.

**M**OTION on the 11th, the last Day for presenting a Petition against a Bankrupt's Certificate, that a Petition prepared, but not properly signed, might be ordered to be received on the 13th, and considered as presented on the 11th.

Refused.

Ex parte HENSON.—In the Matter of WATSON.

1815.  
11th, 15th  
November.

1 Maddock, 112. 116.

The VICE-CHANCELLOR.

**I**F a Sum claimed for Commission is bonâ fide, and not colorably to avoid the Statute, it is not usurious. If it is a Country Transaction, and the Commission usual and not unreasonable, it is not usurious. In the late Case of Kensingtons, in the King's Bench, the Jury did not consider the Commission charged as usurious, and the Court would not grant a new Trial. That was a Town Transaction; but if it had been a Country Transaction, there could have been no Doubt.

Charge by a Bill-  
broker in the Country,  
of ten Shillings per  
Cent. Commission,  
in respect of a Bill  
payable in London,  
not usurious.

**Ex parte M'WILLIAMS.—In the Matter of GRAHAM.**

1815.

11th November.

1 Maddock, 141, 142.

Expense of a provisional Assignment not allowed, except where an Extent is apprehended.

**A** PETITION, praying a Reference to the Master to review the Taxation of the Bill, and to enquire whether a provisional Assignment was necessary.

**The VICE CHANCELLOR.**

A Provisional Assignment is not a Matter of Course, but is proper only where an Extent is apprehended.

**Ordered.**

Note.—It was stated, that in the North it was very much a Matter of Course to have a provisional Assignment, but the Vice-Chancellor expressed his Disapprobation of the Practice.

**Ex parte BINMER.**

1816.

Feb.

1 Maddock, 250, 252.

**A** COMMISSION issued on a Denial concerted by Bankrupt and the petitioning Creditor, superseded with Costs.

**Ex parte JENNINGS.—In the Matter of DAWSON.**

1816.

March 21.

1 Maddock, 331, 339.

**T**HE Court in Bankruptcy will decide the Validity of an equitable Mortgage, without a Reference to the Commissioners; but when the equitable Mortgage is established, a Reference is made to the Commissioners to take an Account of what is due upon it.

**Ex parte**

Ex parte PEAKE.—In the Matter of LIGHTOLLER.

1816.  
5th, 2d, March.

1 Maddock, 346. 362.

**V**ENDOR has a Lien on Estate sold for his Purchase Money, though he has received Bills from the Vendee in Payment, and though the Vendee become Bankrupt.

One Partner may agree with retiring Partner to give him a Sum for the Concern, though they know the Partnership was insolvent, provided no Fraud was intended.

O'BRIEN v. GRIERSON.

1816.  
June 28, 29.

2 Ball and Beatty, 323. 337.

**A**SSIGNEES of a Bankrupt, paying Debts contracted after Bankruptcy, but before the Commission under Orders of the Court, and of the Commissioners, not liable to repay the Amount to the prior Creditors.

It is not correct for Commissioners of Bankrupt, when receiving the Proof of a Debt, not to enquire at what Period the Debt was contracted.

HEWES v. MOTT.

1816.  
Saturday, Feb. 10.

2 Marshall, 192, 193.

**R**ULE to shew Cause why the Defendant should not be discharged out of Custody, having obtained his Certificate. The Plaintiffs had been Bail for the Defendant in a former Action, and been fixed

Bail are not to be considered as Sureties for, or as liable for the Debt of a Bankrupt, within the Meaning of 49 Geo. 3, c. 121, s. 2. with

## CASES IN BANKRUPTCY.

1816.  
HEWES  
v.  
MOTT.

with the Debt after the Commission issued. The Ground of this Application was, that at the Time of issuing the Commission, they were Sureties for, or were "*liable for*," the Debt of the Bankrupt, and therefore might prove by Virtue of Stat. 49 Geo. 3, c. 121, s. 8.

Lord Chief Justice GIBBS.—We do not think that Bail are to be considered as Sureties for, or as liable for the Debt of the Bankrupt within the Meaning of the Act. They enter into a Bond for the Defendant's Appearance, and their immediate Responsibility is to the Sheriff. We have communicated with the King's Bench on the Subject, and they agree with us.

Per Curiam.

Rule discharged.

DOE, on Demise, &c. v. BEVAN.

3 Maule and Selwyn, 353.

**DEMISE**, for Years to S.—S. covenants that he, his Executors, Administrators, or Assigns, would not assign the Indenture, or his or their Interest therein, or assign the Premises to any Person whatsoever, without Consent in Writing of Lessor.

Proviso, that in Case S. his Executors, Administrators, or Assigns, should part with his or their Interest, contrary to his Covenant, the Lessor might re-enter.

S. deposited the Lease as a Security for Money borrowed, and became bankrupt; and the Lease was sold by Direction of the Chancellor, to pay that Debt.

Held, that the Assignees under the Commission might assign the Lease to the Vendee without the Consent of the Lessor.

ROBERTS

ROBERTS v. HARDY.

3 Maule and Selwyn, 533. 536.

1815.

Tuesday, Feb. 7.

**TRESPASS.** Verdict for the Plaintiff, subject to a Case.

Walker and Coggill were Partners. The Plaintiff was indebted to them in 100*l*. In 1811, Coggill having been in America, came to England, and in July, 1812, returned to America, taking his Family with him. Previously to which, the United States declared War against this Country, but that was unknown when Coggill set Sail. An Act of Congress was passed to enable British Subjects to quit America within Six Months. Coggill did not leave the United States; but he did not trade there, nor was under any Restraint, except that British Subjects were ordered not to quit their Places<sup>(a)</sup> at their Peril. At this Place he resided, when the Commission issued against the Plaintiff on the Petition of Walker and Coggill, founded on the above Debt.

A Debt due to two Partners is good to support a Commission of Bankruptcy, notwithstanding one of the Partners is resident in an Enemy's Country, such Residence not being shewn to be an adhering to the Enemy.

LORD ELLENBOROUGH.—I reserved the Point on the Authority of *M'Connel v. Hector* (*b*), and in Deference to the Judgment of Lord Alvanley. There, it is observable was a trading. If that Fact was so here, we might draw the same Conclusion. But I think a mere Residence is not sufficient.

(*a*) Those who did not quit the Country within the Six Months, were by an Order of the Government obliged to obtain Passports, and remain at fixed Places.

(*b*) *Ex parte Baglehole*, 1 Vol. 271.

Vide ante, p. 174.

TAYLOR against Sir THOMAS PLUMER.

3 Maule and Selwyn, 562. 580.

1815.

Friday, Feb. 10.

**TROVER.** Verdict for the Plaintiff, subject to a Case, which stated the Plaintiff to be the Assignee of Walsh, under a Commission of the 10th December, 1811, against Walsh, a Stock Broker. In August

Where a Draft for Money was intrusted to a Broker to buy Exchequer Bills for his Principal, and the

Broker received the Money, and misapplied it, by purchasing American Stock and Bullion, intending to abscond with it, and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the Principal the Securities for the American Stock and the Bullion, who sold the Whole, and received the Proceeds. Held, that the Principal was entitled to withhold the Proceeds from the Assignees of the Broker, who became bankrupt on the Day on which he so received and misapplied the Money.

of

1815.  
TAYLOR  
v.  
Sir THOMAS  
FLUMER.

of that Year, the Defendant expecting to have occasion for a large Sum of Money to pay for an Estate, consulted Walsh on the Propriety of selling out Stock to provide for such Payment. In November, Walsh recommended the Defendant to sell out Stock, and on the 28th November, Defendant sent Walsh Orders to sell. Sales were accordingly effected by Walsh, as Broker, on the 29th, to the Amount of 21,774*l.* 5*s.*; the Transfers to be made, and the Money to be paid on the 4th December. On the 4th the Stock was transferred by the Defendant, and the Price was received by Walsh, who, on the same Day, paid 21,500*l.* Part of the Price, into the Defendant's Bankers, to the Defendant's Account, and informed him of it. The Defendant proposed to Walsh to invest the Money in Exchequer Bills, until it should be wanted to pay for the Estate, and desired him to call the following Day. Accordingly, on the next Day, the 5th, about eleven o'clock, Walsh called, when the Defendant gave him a Draft for 22,200*l.*, to lay out in Exchequer Bills, to be delivered on the same Day to him the Defendant, or his Bankers. Walsh received the Amount of the Draft in Twenty-two Bank of England Notes of 1000*l.* each, and one of 200*l.*; but purchased Exchequer Bills to the Amount of 6500*l.* only, and he lodged them at Gosling's, on the Defendant's Account. In the Afternoon, he called on the Defendant, and told him that he had lodged the 6,500*l.* Exchequer Bills at Gosling's, and that he had agreed for the Remainder of the intended Purchase of the Exchequer Bills to be delivered at a future Day, and had therefore left a Sum which he named (nearly corresponding with the Difference of the 22,200*l.*) to his Account at Gosling's. But the Fact was, Walsh being ruined and insolvent, had, between the Time of the Sale of the Defendant's Stock and the Time when he received the Price of it, conceived an Intention of absconding with the Money, when it should come to his Hands, and with that View, on the 2d December, had given Order for the Purchase of American Shares Stock, and the Bullion in Question, in Order to take them with him, having no Means of paying for the American Shares and Stock, but out of the Money he expected to receive belonging to the Defendant, nor any Money of his own to pay for the Bullion, but intending to pay for that also out of the Defendant's Money. Accordingly, after receiving the Draft at Gosling's, he went from thence to the American Stock Brokers in the City, received the Certificates, and paid for them with eleven of the identical Bank Notes of 1000*l.* each, which he had just received, taking back from the Broker, to whom he paid them, the Difference of 540*l.* 1*s.* 6*d.* The same Morning he delivered to his Brother-in-Law another of the 1000*l.* Bank Notes, and received from his Brother-in-Law in Exchange a Draft for 500*l.*, and another for 100*l.*, leaving the Remainder in his Brother-in-Law's Hands, and with the 500*l.* Draft he paid for the Bullion, receiving the Difference from the Goldsmith. In the Morning of the

5th

1815.  
TAYLOR  
v.  
Sir THOMAS  
PLUMER.

5th he left his House, intending not to return, but to proceed immediately to America. He left London by the Mail Coach, taking with him the Securities and Bullion in Question. He was pursued by the Defendant's Attorney and a Police Officer, by the Defendant's Desire; and on the 9th they overtook Walsh waiting at Falmouth for the Packet, and he then surrendered the Property to the Attorney for the Defendant, and executed a Deed, assigning the Property to the Defendant, in Trust to sell and pay himself, also a Bond, conditioned for Payment of £15,500 (a) and Interest, and a Warrant of Attorney for confessing a Judgment upon such Bond, which were prepared by the Attorney, and delivered to him. They all returned to London, when Walsh was afterwards indicted for Felony, tried, and found guilty, but was pardoned (b). The Case stated, that the Act of Bankruptcy was committed on the 5th of December; that Walsh's Advice to the Defendant to sell out his Stock was *bonâ fide*, and no false Pretence was used to obtain the Defendant's Draft on Messrs. Goalsing, or the Possession of the Money which he afterwards misapplied. The Question for the Opinion of the Court is, whether the Plaintiffs are entitled wholly, or in Part to recover.

Marryat, for the Plaintiff, admitted, that Property in the Hands of an Agent who becomes Bankrupt, entrusted to him for a special Purpose, belongs to the Principal, and not to the Representatives of the Bankrupt Agent. Also, that where the Property is not the same, but has been acquired by the Bankrupt in Lieu of the Trust Property, and in Pursuance of the Trust, the same Rule applies to it, provided such Property is capable of being ascertained. But that where the Property had been *tortiously* acquired by the Agent, in *Fraud* of the Trust, there the Lien of the Principal is at an End, because he cannot aver what has been done in *Fraud* of his Trust, to have been done in *Execution* of it.

Abbott, *contra*, denied the Distinction taken, contending, that nothing passed by the Assignment, but what was in Equity, as well as Law, the Property of the Bankrupt. That a Party has a Right to the Produce money misapplied by his Agent, so long as such Property remains in the Hands of the Agent, capable of being ascertained, and has the same Right against the Assignees of the Agent.

Lord ELLENBOROUGH, C. J.

The Plaintiff is not entitled to recover, if the Defendant has succeeded in maintaining these Propositions in point of Law: viz. that

(a) Being about the Difference between the Price of the 6500l. Exchequer Bills, and the 22,300'.  
(b) See 4 Taunt. 258.



1815.  
TAYLOR  
v.  
Sir THOMAS  
PLUMER.

the Property of a Principal entrusted by him to his Factor for any special Purpose, belongs to the Principal, notwithstanding any Change which that Property may have undergone in Point of Form, so long as such Property is capable of being identified and distinguished. And secondly, that Property thus circumstanced is equally recoverable from the Assignees of the Factor, in the Event of his becoming a Bankrupt, as it was from the Factor himself before his Bankruptcy. And indeed it should seem, that if the Property in its original State and Form was covered with a Trust in Favour of the Principal, no Change can divest it of such Trust, or give the Factor, or those who represent him, in Right, any other more valid Claim in Respect to it, than they respectively had before such Change. An Abuse of Trust can confer no Right on the Party abusing it, nor on those who claim in Privity with him. The Argument in Favour of the Plaintiffs, that the Property of the Principal continues only so long as the Authority of the Principal is pursued, is mischievous in Principle, and supported by no Authorities. The Contention on the Part of the Defendant was represented by the Plaintiff's Counsel as pushed to an extravagant Length, in the Defendant's Counsel being obliged to contend, that "if A. is trusted by B. with Money to purchase a Horse for him, and he purchases a Carriage with that Money, that B. is entitled to the Carriage." And indeed, if he be not so entitled, the Case on the Part of the Defendant appears to be hardly sustainable.

It makes no Difference in Reason or Law, into what other Form, different from the Original, the Change may have been made. Whether it be into that of promissory Notes for the Security of the Money which was produced by the Sale of the Goods of the Principal, as in *Scott v. Surman* (a), or into other Merchandize, as in *Whitcombe v. Jacob* (b), for the Produce of, or Substitute for, the original Thing, still follows the Nature of the Thing itself, as long as it can be ascertained to be such, and the Right only ceases when the Means of Ascertainment fail, which is the Case when the Subject is turned into Money, and mixed and confounded in the general Mass of the same Description.

The Difficulty which arises in such a Case, is a Difficulty of Fact, and not of Law. No Difficulty, however, in Respect to Proof, nor any peculiar Rules or Habits of Courts of Equity, in Respect to the charging of Land, stand between the original Proprietor and his Right in Respect to the ascertained Produce of his own Funds upon this Occasion. He has repossessed himself of that of which, according to the Principles established in the Cases I have cited, he never ceased to be the Proprietor; and we are of Opinion, that the Assignees cannot, in

(a) Willes, 400.

(b) Salk. 180.

this Action, recover that, which if an Action were brought against them by the Defendant, they could not have retained against him.

We are of Opinion, that the Defendant is entitled to retain the Subject of the present Suit, and, of Course, that a Nonsuit must be entered.

1815.  
TAYLOR  
v.  
Sir THOMAS  
PLUMER.

LOYD v. STRETTON.

1 Starkie's Reports of Cases at Nisi Prius, 40, 41.

1815.  
Thursday, May 23.

**T**ROVER. Park for the Defendant proposed (a) to call the petitioning Creditor to defeat the Commission.

Lord ELLENBOROUGH.

I think he may be called to defeat the Commission, though he cannot be called to support it.

A petitioning Creditor is a competent Witness to defeat a Commission, and even to cut down the petitioning Creditor's Debt.

(a) Green v. Jones, 1 Camp.

CORSBIE v. OLIVER.

1 Starkie's Reports, 76, 77.

**D**EBT on Bond;—Plea—Payment.

1815.  
Tuesday, June 27.

Littledale contended, that it was incumbent on the Plaintiffs to prove themselves Assignees, as stated in the Declaration.

Lord ELLENBOROUGH.

A Party who puts himself upon one Issue, admits all the rest.

Verdict for the Plaintiffs.

Debt on Bond by the Plaintiffs as Assignees of a Bankrupt; Plea Payment. It is not incumbent on the Plaintiffs to prove themselves to be Assignees.

## DE TASTET v. CARROLL.

J Starkie, 88. 90.

1811.

A Transfer of Property made on the Eve of Bankruptcy, but under the apprehension that a Degree of Force, civil or criminal, is about to be applied, is valid.

A Transfer by one of two Partners on the Eve of Bankruptcy, under Circumstances which overcome the free Will of the Party, such as the Apprehension of a Prosecution for Forgery, is valid.

**T**ROVER against the Assignees of Parry and Latham, Bankrupts.

Parry committed an Act of Bankruptcy on the 17th January, 1813. He had before then been employed by the Plaintiff to purchase Rum for him to a large Amount; and on the 14th January, he had Property which stood at the Custom-house in his own Name, (but purchased on the Plaintiffs Account) to the Amount of £60,000.

On the 14th it appeared that a Bill of Exchange for £22,000, which had been deposited by Parry with De Tastet as a Security, was a Forgery. Upon this, De Tastet, alarmed for his Property, insisted upon its being immediately transferred; and it was accordingly transferred to him on the 14th and 15th Days of January.

GARROW, A. G.—Submitted that it was not competent to Parry, under an Apprehension of a Prosecution for Forgery, to deal with the Goods of his Partner; but

Lord ELLENBOROUGH.

Every thing which might overcome the free Will of the Party, was sufficient to exclude a voluntary Preference. Parry, as a Partner, had the Power of disposing of the partnership Property.

Verdict for the Plaintiff.

In the ensuing Term, the Court of K. B. refused a Rule Nisi for a new Trial.

HERVEY

HERVEY and OTHERS, Assignees, v. LIDDIARD.

1 Starkie, 123, 124.

1815.

**A**SSUMPSIT by the Assignees of M. B. Hervey, and I. W. Hervey, Bankrupts, to recover £339.

I. W. Hervey had become indebted in a larger Amount than the Sum in Dispute to the Defendant Liddiard.

In Part Payment, I. W. Hervey drew a Bill on Jemmett and Co. Bankers in Kent, and through one Wade, procured the Bill to be discounted, and Wade agreed to send the Amount to the George Inn in the Borough, for the Use of I. W. Hervey.

The Bill was discounted on the 16th May. On the 17th, I. W. Hervey committed an Act of Bankruptcy having first given to Liddiard an Order to receive the Money. The money arrived in London on the 18th; and on the 19th it was received by Liddiard's Porter.

A. shortly before his Bankruptcy, draws a Bill, and having procured it to be discounted, gives B. a Creditor an Order to receive the Amount, which he directs C. who discounts the Bill to transmit to B. whilst the Money was in the Hands of the Carrier. A. commits an Act of Bankruptcy. B. who afterwards receives the Money, is liable to A's Assignees.

Lord ELLENBOROUGH

Was of Opinion, that whilst the Money remained in the Hands of the Carrier, the Property remained unaltered.

KIERAN v. JOHNSON and ANOTHER, Assignees of MAC-MASTER.

1 Starkie, 109. 111.

1815.

December 11.

**A**SSUMPSIT for Money had and received by the Defendants, as the Assignees of Macmaster, a Bankrupt, to the Use of the Plaintiffs.

BAYLEY J.—Was of Opinion, that it would be necessary to prove that the Product of the Bill actually came into the Hands of the As-

In order to make the Assignees of a Bankrupt liable for Money had and received by the Bankrupt for a specific Purpose, it is necessary to prove that the Money came into the Hands with a Knowledge of the Purposes for which it is destined.

signees

1815.

KIERAN

v.

JOHNSON and  
Another, Assignees of  
MACMASTER.

signees, with a Knowledge, on their Part, of the Purposes for which the Bill was destined.

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REED and ANOTHER, v. JAMES.

1 Starkie, 132, 133.

Qu. Whether in an Action by the Assignees of a Bankrupt, the petitioning Creditor is compellable, in a Court of Law, to produce the Bill of Exchange, named and indorsed by the Bankrupt, on which the petitioning Creditor's Debt is founded. A petitioning Creditor called for the mere Purpose of producing such a Document, cannot, although he has been sworn, be cross-examined by the Defendant.

**T**INSON, the petitioning Creditor, was sworn, and called upon to produce the Bill of Exchange, which constituted the petitioning Creditor's Debt.

Tinson addressed the Court to know whether he was obliged to produce it.

Lord ELLENBOROUGH.

You cannot, with Propriety, withhold the Instrument. I cannot, however, do more than advise you to exercise a sound Discretion on the Subject.

Tinson then produced the Bill.

The Attorney-General contended, that he had a Right to cross-examine Mr. Tinson for the Defendant, since he had been sworn, and some Proof had been derived through him.

Lord ELLENBOROUGH.

The Plaintiff could not, by calling the petitioning Creditor, make him a Witness. I should not have permitted him to give Evidence.

REED

REED and ANOTHER, v. JAMES.

1 Starkie, 134. 136.

1815.

**A**SSUMPSIT to recover Money had and received by the Defendant, to the Use of the Assignees.

The Defendant, on the 9th of July, 1814, (eight Days after the Acts of Bankruptcy) sued out Execution on a Warrant of Attorney, executed by the Bankrupt in the preceding March. The Sheriff took Possession of the Goods of the Bankrupt, and executed a Bill of Sale of them to the Defendant, for £800. It was objected for the Defendant, that the Form of Action should have been Trover.

Lord ELLENBOROUGH

Was of Opinion, that the Action was maintainable in its present Form, although Trover might have been preferable. That he would reserve the Point, though he did not think it was attended with much Doubt.

One of the Bankrupts having been called to prove that the Defendant knew their *Insolvency* when the Execution was issued,

GARROW, A. G.—Objected; but

Lord ELLENBOROUGH

Said, he was competent. That the Rule was restricted to Evidence affirming or disaffirming the *Bankruptcy*.

The Assignees of a Bankrupt may recover as for Money had and received against the Defendant, who took the Goods of the Bankrupt in Execution, (after an Act of Bankruptcy) and then took the Goods under a Bill of Sale from the Sheriff, although no Money was actually paid.

A Bankrupt in an Action by the Assignees against a Judgment Creditor who has taken the Goods of the Bankrupt in Execution, is competent to prove that the Creditor knew that the Bankrupt was insolvent at the Time of the Execution.

WINDHAM

**WINDHAM and ANOTHER, Assignees of Sir WILLIAM  
FLETCHER, v. PATERSON.**

1 Starkie, 144. 146.

1818.

It is no Objection to the petitioning Creditor's Debt, that the petitioning Creditors were in Partnership with the Bankrupt in a particular Transaction, provided the Debt does not arise out of that particular Transaction.

A Trader who leaves England, and proceeds to Ireland, (where he carries on Trade) with an honest Intention, compatible with Trade, does not thereby commit an Act of Bankruptcy, although he never returns; and although he leaves no Funds in England for the Payment of his Debts.

**ON** proving the petitioning Creditor's Debt, it appeared that Todhunter and Co. the petitioning Creditors, had all been in Co-partnership with Fletcher, in a Contract to supply Provisions for the Use of the Navy.

**GARROW, A. G.**—Objected, that they could not be petitioning Creditors, until their Affairs had been settled.

**Lord ELLENBOROUGH.**

If the Debt does not arise out of the Partnership Concerns, they may

To establish the Act of Bankruptcy, the Plaintiff relied upon the Fact, that Sir W. F. had departed from England to Ireland (where he also carried on Trade) without leaving Funds behind for the Payment of his Debts. *Holroyd v. Whitehead* (a).

**Lord ELLENBOROUGH.**

If he departed with a *bonâ fide* Intention to return, he committed no Act of Bankruptcy. In the Case before Sir V. Gibbs, the Purpose was entirely alien from that of Trade.

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The Plaintiffs then proved, that Sir W. F. from Ireland went to Paris; from which Place he wrote, announcing his solemn Intention never to revisit England.

**Lord ELLENBOROUGH**

Held, that this was an Act of Bankruptcy under the Words of the Statute "or otherwise absent himself."

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It appeared that after the Act of Bankruptcy, a Suit had been instituted against Macquoid, a Creditor of Sir W. Fletcher's, in the Mayor's Court; and that the Defendant, who had Funds of the Bank-

(a) Ante, 145.

rupt in his Hands, upon an Attachment issuing against him as Garnishee, in November, 1814, paid to Macquoid £400; but

Lord ELLENBOROUGH

Was of Opinion, that a mere Attachment did not justify the Defendant in paying over the Money before Judgment, and that he ought to have compelled the Plaintiff in that Suit to bail the Attachment.

1815.

WINDHAM and  
Another, Assignees of WILLIAM  
FLETCHER, v.  
PATERSON.

The Assignees of JAMIESON v. HODSON.

1 Starkie, 150, 151.

1815.

**A**CTION for Money had and received.

Jamieson, leaving England, executed a Power of Attorney, empowering Hodson to act for him; and afterwards was in the Habit of drawing Bills, which were accepted by Hodson.

Jamieson, from Calcutta, whilst solvent, consigned a Cargo to Forbes and Co. at Bombay, directing them to transmit the Proceeds to Hodson in London.

Jamieson became a Bankrupt, and Forbes and Co. having sold the Saffron, remitted to Hodson, who was then a Bankrupt, a Draft for the Amount.

The Question was, whether Hodson (who defended for his Assignees) was entitled to retain this Money.

Lord ELLENBOROUGH

Was of Opinion, that since this Remittance had been made in Pursuance of an Order given by Jamieson whilst he was solvent, and without Fraud, the Defendants were entitled to retain the Amount.

A. whilst he is solvent and resident at Calcutta, directs B. at Bombay to remit certain Proceeds to C. in England, who is in the Habit of accepting certain Bills for A. This Order is executed by B. without Fraud; but after an Act of Bankruptcy committed by A. C. has a Lien on the Sum received for his Balance.



## CASES IN BANKRUPTCY.

BACK and ANOTHER, Assignees of BURROUGH and WYNNE,  
v. GOOCH.

1 Holt, Nisi Prius, 13—17.

**I**F the petitioning Creditor be privy, and assenting to the Execution of a Deed by Traders, by which they make an Assignment of all their Property, though such Assignment be fraudulent, and an Act of Bankruptcy, upon which other Creditors, not privy and assenting, may sue a Commission, he is estopped, and having assented to the Deed, though he did not execute it, he cannot set it up as an Act of Bankruptcy.

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SHEW and ANOTHER v. THOMSON.

1 Holt, 159, 160.

**A** TRADER directs his Servant, "that if any one should come whilst he was at Dinner, or engaged in Business, she should deny him."—Held, that such Instructions did not amount to a Direction for a general Denial; and therefore, although a Creditor called and was denied, it was no Act of Bankruptcy.

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CUMMING v. ROEBUCK.

1 Holt, 172, 173.

**A**N uncertificated Bankrupt may sue as a Trustee for his Assignees, unless they interfere.

WARNER

WARNER and ANOTHER v. BARBER.

1 Holt, 175—177.

**A** TRADER having Business both in England and in Spain, has a Right to go to the latter to look after his Concerns; and though his Creditors are thereby delayed, it is no Act of Bankruptcy. But if he likewise goes Abroad from the Fear of Arrest, though it concur with the justifiable Motive, that of looking after his Business, it is an Act of Bankruptcy.

BROWN and ANOTHER, Assignees of RIORDEN, v. FORRESTALL and ANOTHER.

1 Holt, 190, 191.

**N**OTWITHSTANDING there has been no Notice to dispute the Commission, Act of Bankruptcy, &c. under the 46 Geo. 3, c. 135, s. 10, the Proceedings are not conclusive Evidence of the Facts therein stated, but the Court is still to form a Judgment upon them, whether they prove an Act of Bankruptcy or not.

GASKELL and ANOTHER v. LINDSAY and ANOTHER.

1 Holt, 212—215.

1816.

**A**ND Co. guaranteed to B. and Co. Payment for any Goods which they might supply to C. within a certain Period, at Credit of two and two Months. C. becomes indebted to B. and Co. for Goods, and then gives them three Bills of Exchange in Payment, indorsed by A. and Co., who shortly after become Bankrupts. One of these Bills was dishonoured before, and the other two Bills after their Bankruptcy. C. was likewise indebted to B. and Co. before the Bankruptcy of A. and Co. for some Goods, which they had a Right only to call on C. to give them a Bill at two Months at the Time of A. and Co.'s Commission. Held, that in an Action brought upon the Guarantee against A. and Co. their Certificate was a good Defence, by Virtue of the Stat. of the 49 Geo. 3, c. 121, s. 9.

## MOORE v. WRIGHT.

3 Marshall, 209, 210.

Where to an Action by the Assignees of a Bankrupt, for a Debt due to the Bankrupt's Estate, the Defendant set off Notes in his Possession, issued by the Bankrupt before the Bankruptcy; Proof that Notes to the Amount of the Set off came into his Hands three or four Weeks before the Bankruptcy, was held sufficient Evidence, from which the Jury might infer that he was in Possession of them at the Time of the Bankruptcy, without identifying them with the Notes produced.

**T**HIS Action was brought by the Assignees of Bankrupts, who had been Bankers at Boston, to recover 1447*l.* 17*s.* 3*d.*, being the Balance of the Defendant's Account. The Defendant gave Notice of Set-off, the Particulars of which consisted of Notes which had been issued by the Bankrupts before the Bankruptcy. At the Trial, the Defendant proved that the Bankrupts had discounted Bills for him in Notes of their own, to the Amount of about 700*l.* three Weeks before the Bankruptcy, and the Jury accordingly found a Verdict for the Plaintiff for the Balance only.

Mr. Serjeant VAUGHAN now moved that this Verdict should be set aside.

Lord Chief Justice GIBBS.

It has always been a Question for the Jury, whether the Notes were in the Possession of the Party at the Time of the Bankruptcy; and though there might be a Probability that the Defendant did not keep the Notes in his Possession, and it would be very proper to urge such a Probability to the Jury, yet there certainly was Evidence of his having received them; and it is to be presumed that the Jury did not draw the Conclusion which they did, without giving all the Arguments against such a Conclusion their due Weight.

The Rest of the Court were of the same Opinion.

Rule refused (a).

(a) See Dixon v. Evans, 6 T. R. 51.

BAKER v. LANGHORN,

2 Marshall, 215—217.

1816.  
May 3.

**T**HIS Action was brought by the Assignees of a Bankrupt Underwriter against the Defendants, who were Insurance Brokers, to recover the Sum of 104*l.* 4*s.* 3*d.* for Premiums due to the Bankrupt. At the Trial, the Defendants admitted this Claim upon them, which it appeared they had promised to pay, but contended that they were entitled under Stat. 5 Geo. 2, c. 30, s. 28, to set off the Sum of 250*l.* which was due to them from the Bankrupt, in Respect of two Policies underwritten by him before the Bankruptcy, which they had effected in their own Names, as Agents for a Mr. Mann, but without a Commission *del credere*, and which they kept Possession of as a Security for a Debt due to them from Mann. An Adjustment had taken Place, in Consequence of a Report that the Ship had foundered, which afterwards proved to be untrue, though she was afterwards, and before the Bankruptcy, really lost; and the Defendants had paid Mann the Amount of the Subscriptions. The Chief Justice directed the Jury to find for the Defendant, provided they thought the Adjustment ought to stand good; and for the Plaintiff, if they were of a contrary Opinion; and they found for the Plaintiff.

In an Action by the Assignees of a Bankrupt Underwriter against a Broker, for Premiums due to the Bankrupt; *semble*, that the Broker cannot set off a Loss on a Policy, effected by him as Agent, without a Commission *del credere*, where there has been no Adjustment, though the Loss took Place before the Bankruptcy.

The Solicitor General now moved that this Verdict should be set aside.

Lord Chief Justice GIBBS.

If I underwrite for A. B. in his own Name, without Proof that he is acting for another, I must take him to be the Principal; but if he be acting expressly as Agent, I know that he is not the Principal, and that any Contract I may enter into with him is not a Contract of Insurance. The Case of *Grove v. Dubois* (a) is the Source from whence all the modern Decisions on this Point have sprung. I have often endeavoured but in vain, to discover the Principle on which that Case was decided. The Fallacy in that Case, consists in considering the Broker to be the principal Debtor, when he ought only to become so on the Failure of the Underwriter. In the present Case, however, an Account was produced, in which the Defendants were debited for this very Sum, which it appeared they had repeatedly promised to pay; and it was not till

(a) 1 T. R. 112.

afterwards

1816.  
BAKER  
v.  
LANGHORN.

afterwards that they pretended to have a Case of mutual Credit, so that the Verdict may be accounted for by the Jury considering that they had acceded to the Account thereby, and by their Promises lulling the Plaintiffs into a false Security.

The Rest of the Court concurred.

YOUNG v. WRIGHT and OTHERS.

1816.  
May 14.

2 Marshall, 233—235.

**A.** COLLUSIVELY assigns his House in Town, Stock, &c. to B, and retires to Paddington. B. takes Possession and carries on the Business, concealing A.'s Residence from his Creditors. Three Months afterwards a Commission of Bankrupt issues against A, under which the Assignees take Possession of the House, &c. as being still the Property of A. In an Action of Trespass by B. against the Assignees, held, that the fraudulent Conveyance was not a sufficient Defence without proving an Act of Bankruptcy by A.—But that there was Evidence to go to the Jury of A.'s having committed an Act of Bankruptcy "by departing from his Dwelling House, or otherwise absenting himself."

GIMMINGHAM v. LAING.

1816.  
May 14.

2 Marshall, 236—242.

The Publisher of a Newspaper buying the Whole daily Impression from the Proprietors, re-selling it at a Profit, and bearing the Loss of such as remained unsold, is a Trader within the Bankrupt Laws.

**T**ROVER by the Assignees of Heywood, a Bankrupt, against the Sheriff. At the Trial it appeared that the Bankrupt had been Publisher of the Courier Newspaper; that he bought the whole Impression from the Proprietors, re-selling it at a Profit, and bearing the Loss of such as remained unsold, is a Trader within the Bankrupt Laws.

The Words "or otherwise absent himself," in Stat. 13 El. c. 7, and 1 Jac 1, c. 18, are not confined to an absenting from the Dwelling-House, or any particular Place. Therefore, where a Man in the Habit of attending the Royal Exchange to collect News, left it at the Sight of his Creditors, desiring a Friend to say he was not there; or broke an Appointment he had made with a Creditor to meet him there; or (being the Proprietor of a Theatre) retired behind the Scenes to avoid a Sheriff's Officer, at the same Time giving Orders to be denied to him.—Held, that each of these was an Act of Bankruptcy.

premise

pression each Day from the Proprietors, selling them at a Profit of 1s. 6d. per Quire, and bearing the Loss of such as remained unsold; that he was in the daily Habit of attending the Royal Exchange for the Purpose of collecting News for the Courier; that during the Course of two or three Months previous to the issuing of the Commission, he had frequently retired from 'Change on the Approach of any of his Creditors, desiring a Friend to tell them he was not there; and that on one Occasion he made an Appointment with one of his Creditors to meet him there, but had broken it; that he was also Part Proprietor of the Circus Theatre; that about three Weeks before the Bankruptcy, being at the Theatre, and hearing that a Sheriff's Officer was coming to look for him there, he retired behind the Scenes, requesting a Friend to tell the Officer that he was gone, and remaining concealed till the Officer quitted the Theatre. On this Evidence the Solicitor General contended, that neither the Trading nor Act of Bankruptcy had been proved. The Chief Justice, however, was of Opinion that both were established, and the Jury found a Verdict for the Plaintiffs accordingly; but with Liberty to the Defendant to move to enter a Nonsuit.

1816.  
GIMMINGHAM  
v,  
LAING.

The Solicitor General on a former Day moved accordingly.

Lord Chief Justice GIBBS.

I had no Doubt as to the Trading, nor have I any now. The only Point that remains is, whether Heywood had committed an Act of Bankruptcy. It has never been contended that he had departed from his Dwelling House, or had confined himself to it for the Purpose of delaying his Creditors; but that the Case fell within another Branch of the Statute, which makes it an Act of Bankruptcy, otherwise to absent himself. It does not appear that the Bankrupt had any known Place of Abode;—it is most probable that he had a Lodging somewhere; but there was one Place, viz. the Royal Exchange, at which he was always to be seen. It appears that he had several Creditors, at the Sight of whom he frequently left his Occupation on the Exchange, desiring his Friend to say he was not there; and that on one Occasion he broke an Appointment which he had made with a Creditor to meet him there. There cannot be stronger Evidence of a Man absenting himself from his Creditors, supposing the Construction which I have stated to be correct, and that it is not confined to any particular Place. It is unnecessary to go into the other Cases; it is sufficient for me to say, that I am of Opinion that this Clause constitutes a distinct Act of Bankruptcy.—With respect to what passed at the Circus Theatre, it would be very difficult to distinguish it from what passed on the Royal Exchange; but as we have already decided on the latter Point, it is unnecessary to say any Thing further on the former.

TAYLOR

## CASES IN BANKRUPTCY.

## TAYLOR v. KINLOCH.

1 Starkie, 175—179.

**T**HE Date upon a Promissory Note made by a Bankrupt is *prima facie* Evidence to shew that the Note existed before the Act of Bankruptcy; but no Declaration by the Bankrupt, subsequent to his Bankruptcy, would be admissible to prove this.

The Deposit of Documents relating to a Vessel at Sea will not confer an equitable Lien.

It is competent to a Defendant to impeach the Title of a Bankrupt in an Action by the Assignees, although he himself claim Title under the Bankrupt.

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 RICHMOND v. HEAPY.

1 Starkie, 203—206.

**O**NE of three Partners undertakes to provide for two Bills of Exchange drawn by three Partners, and accepted by a fourth Person, such Acceptances will not support a Commission of Bankrupt against the Acceptor on the Petition of the three Partners. Although the Conduct of the Partner may, as against his Co-partners, have been fraudulent.

Lord ELLENBOROUGH.

Suppose an Action had been brought by the three Partners on these Bills, would it not have been an Answer, that one of the Plaintiffs had promised to provide for the Bills?—assuming Fraud; yet if he cannot recover as one of the three, he cannot be a petitioning Creditor.

DOE v. ANDERSON.

1 Starkie, 262—267.

**A** CREDITOR who has become a Party to a Deed of Trust, is not precluded from suing out a Commission of Bankrupt against the Debtor, on its being discovered that he had, previously to the Execution of the Deed, committed a secret Act of Bankruptcy.

Lord ELLENBOROUGH.

How can he be disqualified as a petitioning Creditor, when he has received no Benefit from the Deed? I admit the Law in *Tappendall v. Burgess* (a). And if the Deed had been relied on as an Act of Bankruptcy, I should have said, that Burgess was not a good petitioning Creditor: but they do not rely on the Deed as an Act of Bankruptcy (b).

(a) 4 East. R. 230. *Bamford v. Baron*, 2 T. R. 294.

(b) The Point was in the ensuing Term brought before the Court of K. B. who concurred in the above ruling.

TARN v. HEYS.

1 Starkie, 278.—280.

**A**N Action may be maintained by a Solicitor against an Assignee for Business done under a Commission of Bankrupt, although the Bill has not been taxed by a Master in Chancery under the Stat. 5 Geo. 2, c. 30, s. 45.

*Flachett v. How*, 2 Campbell, 279.



## POOLE v. LUKIN.

1 Starkie, 328.

**A** DEFENDANT, in an Action by the Assignees of a Bankrupt, pleads the general Issue, without giving Notice of his Intention to dispute the Bankruptcy; but before the Time for pleading expires, delivers the general Issue again with Notice; such Notice is insufficient.

The Defendant, in such a Case, ought to move for Leave to withdraw his Plea.

*Thursday, April 13, 1816.*

IN THE  
MATTER OF BANKRUPTCY.

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LORD CHANCELLOR.

**W**HEREAS the keeping of Holidays in the Office of the Secretary of Bankrupts hath been found inconvenient ; I do, therefore, order, that from and after the Date hereof, no Holidays shall be kept in the said Office, except Christmas-day, Good-Friday, and Days appointed by Proclamation for General Thanksgiving, or Fast ; and that the said Office be kept open from Ten o'Clock in the Morning till Three o'Clock in the Afternoon, and from Six till Eight in the Evening ; and that no Docket shall hereafter be struck, on any Account whatever, but between the said Hours of Ten and Three, or the said Hours of Six and Eight, nor in any Case be considered as struck until the same shall be entered in the Docket Book ; to which Docket Book all Solicitors of the Court of Chancery shall have free Access, during the Hours  
aforesaid,

aforesaid, upon Payment of the usual Fee of one Shilling; but that no additional or other Fee, above the usual and accustomed Fees now payable for the Transaction of the same Business in Office-hours, shall be taken, received, or accepted, for the Transaction of any Business out of the said Office-hours, hereby appointed, or on any Holiday.

AND IT IS FURTHER ORDERED, that in Case any Person who shall hereafter strike any Docket shall not, within four Days after such Docket shall be struck, order a Commission to be sealed at the then next public Seal, in Case there shall be a Public Seal within seven Days next after such Docket shall be struck, or by a Private Seal within eight Days after the striking of such Docket, and shall not cause the same to be sealed accordingly, then that any Person may be at Liberty to sue out a Commission without any Notice being given to the Person who shall first have applied for such Commission. And that in Case two or more Persons shall apply at the same Time to strike a Docket against the same Person, and both of them shall be prepared to sue out a Commission forthwith, that then it shall be determined by Lot, which Person shall sue out such Commission; but in Case only one of such Persons shall be then prepared to sue out such Commission, then that the Commission shall be issued to the Person who shall be so prepared.

ELDON, C.

# TABLE

OF

## CONTENTS.

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### A.

#### ABATEMENT.

*See PRACTICE.*

#### ACT OF BANKRUPTCY.

1. It is not an Act of Bankruptcy for a Debtor to cause himself to be denied to a Creditor calling by the Debtor's Appointment for Payment on a Sunday. *Ex parte Preston in the Matter of Preston.*  
*Page 21*
2. It is an Act of Bankruptcy, by beginning to keep House for a Trader to cause himself to be denied to a Creditor calling not for Payment of his Debt, but in order

to cover it by buying Goods to the Amount. *Ex parte Harris. Page 67*

3. The Relation to the Act of Bankruptcy is confined to an Act subsequent to the petitioning Creditor's Debt. *Ex parte Birkett.*

71

4. Where a Trader being arrested for a Debt of £135. escaped from the Officer and fled to the House of another, and was pursued by the Officer and inquired for at the House, but was denied, and the Door kept fast; and whilst he remained there, declared that he did it for Fear of other Creditors, and when it was dark returned Home, and gave Directions to deny him  
to

to any one that called, and continued nearly a Month in his Bed-chamber. Held, that this constituted one or more Act or Acts of Bankruptcy under the Words of the Statute, "beginning to keep House," or "otherwise absenting himself; and a Creditor of the Bankrupt, who had sued out a Writ against him, and without proceeding upon it, afterwards received from him a Bill of Exchange in part Payment of his Debt, after being apprized that there had been a Meeting of his Creditors, and that the Bankrupt's Affairs at that Time were only capable of paying the Demands of his Creditors by Instalments, although he was assured by the Bankrupt's Agent that they would come round," was liable to refund the Proceeds of such Bill to the Assignees of the Bankrupt, as a Payment not in the usual Course of Trade, and before Notice of his Insolvency. *Bayley v. Schofield.*

Page 100

5. A Trader in Prison employed an Auctioneer to sell Goods, who sent him the Proceeds by the Defendant. The Trader became bankrupt by lying two Months in Prison. Held, that the Assignees could not recover from the Defendant, who was a mere Money-bearer, the Money he had received and paid over. *Coles v. Wright.*

110

6. Where a Trader went to his Neighbour and told him he expected to be arrested, and while he remained there was informed that a Sheriff's Officer was going towards his House, upon which he concealed himself in the back Room, and desired his Neighbour to watch, and when told that the Officer had gone past his House, and had left the Street, immediately returned Home. Held, that this was an Act of Bankruptcy within the Words of 13 Eliz. c. 7, and 1 J. c. 15, "otherwise absenting himself, to the Intent to delay Creditors," although it appeared not only that no Creditor was delayed, but that none could possibly be delayed. *Chenoweth v. Haley.*

Page 137

7. Where a Trader departs from his Dwelling-house on Account of domestic Dissensions, if he makes no Arrangement for carrying on his Business in his Absence, and he foresees that, as a necessary Consequence, his Establishment must be broken up, and his Creditors must be delayed, which Events accordingly happen, he thereby commits an Act of Bankruptcy. *Holroyd v. Whitehead.*

145

8. The Act of Bankruptcy created by 4 Geo. 3, c. 33, must, in some of its Circumstances, be proved by a Creditor, but his Testimony not received as to Facts, of which Evidence can be obtained from other Sources.

Sources. Ex parte Harcourt.

Page 203

It ought to appear upon the Deposition as an Ingredient of the Act of Bankruptcy under 4 Geo. 3, c. 33, that the Summons required to be served on the Trader M. P. was taken out after the Affidavit was filed of Record. *ibid.*

9. Where one of three Partners in a Banking Concern, who resided at the Place where the Banking-house was, and was the only Partner who transacted the Business, the other two residing at a Distance from it, absented himself from the Banking-house, shut it up, and stopped Payment. Held, that this was not Evidence of a joint Act of Bankruptcy by all three. The Defendant, though he has given no Notice that he intends to dispute the Proceedings under the Commission, may, nevertheless, give Evidence to disprove the Act of Bankruptcy. *Mills v. Bennett.* 269
10. A Trader left a Message at his House for a Creditor who had in his Absence called for a Debt, that he could spare no Money, and would not pay him that Day, and would go out of the Way, and stay till Dinner-time. Held, that it was for the Jury to consider whether he absented himself to delay a Creditor; and this Evidence warranted their Conclusion, that he did not.

So where he absented himself from

his House where his Creditors were, to avoid Irritation and harsh Language. *Vincent v. Prater.* Page 275

11. A Trader being arrested for Debt, is sick in Bed, and so ill that he cannot be removed without endangering his Life. He is therefore allowed to remain sometime in his own House, and then carried to Gaol, where he remains till the Expiration of two Months from the Date of his first Arrest. Held, that this was a sufficient lying in Prison under 21 Jac. 1, c. 19, s. 2, to constitute an Act of Bankruptcy. *Stevens v. Jackson.* 284

12. Persons ordered to attend Commissioners to prove Act of Bankruptcy, having refused Obedience to the Warrant of the Commissioners, upon the Ground that they were Creditors, and therefore incompetent as Witnesses. Ex parte Gooldie. 330

That a Party is a Creditor is not a preliminary Objection to his being examined, as the Result of the Examination may establish that he is not a Creditor. *ibid.*

13. Act of Bankruptcy not permitted to be proved by Affidavit, although the same Person had regularly proved the same Act of Bankruptcy under a prior separate Commission against the same Bankrupt, who had subsequently been included in a joint Commission against him and his Partners. Ex parte Rowe. 339

14. The

14. The Commission and Proceedings are inadmissible Evidence of an Act of Bankruptcy, for the Purpose of defeating a Conveyance. *Whitworth v. Graham.* Page 364
15. Trader going Abroad, leaving no Funds, and when Abroad, writing that he means not to return, commits an Act of Bankruptcy. *Windham v. Paterson.* 465
16. A Person assenting to, although not executing a Trust Deed, cannot set it up as an Act of Bankruptcy. *Back v. Gooch.* 468
17. But he is not precluded from taking out a Commission, where there has been an Act of Bankruptcy prior to the Deed. *Doe v. Anderson.* 475
18. Direction to be denied during Dinner, and a consequent Denial to a Creditor, not an Act of Bankruptcy. *Shew v. Thomson.* 468
19. Going Abroad with a proper Motive not an Act of Bankruptcy, unless there be, at the same Time, a Fear of Arrest. *Warner v. Barber* 469
20. Trader absenting himself from the Royal Exchange, or breaking an Appointment, or retiring behind the Scenes of a Theatre to avoid a Creditor, commits Acts of Bankruptcy in each Instance. *Gemmingham v. Laing.* 472

## ACTION.

See ASSIGNEE.

1. Bankrupt restrained from vexatiously bringing Actions against his Assignees. *Ex parte Bryant.* 1.

When an Action is directed, the Proceedings in the mean Time are suspended. *Ex parte Bryant.* Page 1

2. The petitioning Creditor directed to have the Management of the Defence to an Action brought by the Bankrupt to try the Validity of his Commission, but the Assignee to be fully indemnified. *Ex parte Stewart.* 6
3. Uncertificated Bankrupt may sue as Trustee for his Assignee. *Cumming v. Roebuck.* 468
4. In an Action by Assignees, Defendant may impeach the Title of a Bankrupt, although he claim Title under the Bankrupt. *Taylor v. Kinloch.* 474
5. To an Action of Trespass by B. against Assignees, a fraudulent Conveyance from the Bankrupt to B. (not amounting to an Act of Bankruptcy) held not to be a sufficient Defence. *Young v. Wright.* 472

## AFFIDAVIT.

See PRACTICE.

The filing of an Affidavit in Bankruptcy is the swearing and carrying of it into the Bankrupt Office; it is there within the Reach of the Lord Chancellor, should the Purposes of Justice at any Time require the Production of it. *Ex parte Newton.* 19

## AGREEMENT.

Parol Agreement, although with part Perform-

## TABLE OF CONTENTS.

Performance, not with 40 Geo. 3.  
c. 121. s. 13. Ex parte Sutton.

Page 86

### ALLOWANCE.

1. A Bankrupt paying twenty Shillings in the Pound out of his separate Estate, is not entitled to his Allowance against the Right which his joint Creditors have to the Surplus. Ex parte Holmes. 95
2. Bankrupt under a joint Commission not entitled to an Allowance, though joint Estate pays ten Shillings in the Pound, unless both joint and separate Creditors who have proved, are paid ten Shillings in the Pound.

If one Partner only has obtained his Certificate, no Allowance given to the Partner who has obtained his Certificate, the Allowance being only jointly claimable. Ex parte Powell. 447

3. Commissioners to ascertain Value of Annuity by the Price paid, and the Time of Enjoyment. Ex parte Whitehead. 358

### ANNUITY.

See PROOF.

### ARBITRATION.

A Reference to Arbitration of all Matters in Dispute by Assignees of a Bankrupt, and a consequent Award to pay a Sum of Money, is  
VOL. II.

conclusive upon them as to Assets.  
Robson and Another, Assignees,  
&c. Page 50

### ARREST.

See PROTECTION.

### ASSIGNEE.

See ACTION.

1. An Assignee sustaining a litigated Commission is entitled to his Costs out of the Estate as between Attorney and Client. Ex parte Bryant. 1
2. An Assignee must consider the Commission under which he derives his Authority to be valid, and act under it at his own Risk and Responsibility. The Lord Chancellor not having Jurisdiction to indemnify him against the Consequences of a Supersedeas in the Matter of Bryant. 17
3. Where the Interest of any particular Class of Creditors is not sufficiently represented and protected by the Assignees under the Commission, the Court will appoint an Agent or Inspector on their Behalf, giving him Authority and Indemnity in Point of Expence, as fully as if he were actually an Assignee.

Till the Debt is set aside, the Court will not remove a Creditor from his Office as Assignee upon Suspicion of its Unfairness. Ex parte Miles. 68

K K

4. The



## TABLE OF CONTENTS.

4. The Assignment under an English Commission of Bankrupt vests in the Assignees, and without the Necessity of Intimation, the Whole of the Bankrupt's personal Property in Scotland, and all subsequent Diligence to all Scotch and other Creditors is thereby precluded, *Selkrig v. Davis.*  
*Page 97*
5. Contribution enforced among Assignees in Bankruptcy to reimburse a Payment by one under an Order for a Loss, occasioned by their joint Act, and the Objection that the Defendant acted only for Conformity upon the Representation and Advice of the Plaintiff did not prevail. *Lingard v. Bromley.* 118
6. The Assignees of a Bankrupt are not entitled to the specific Execution of a Contract to lease entered into with a View to the personal Accommodation of the Bankrupt. *Flood v. Finlay.* 147
7. Commissioners have the Power to adjourn the Choice of Assignees from the Day publicly appointed for that Purpose. *Ex parte Garland.* 361
8. Money deposited in the Bank in the Names of three Assignees ordered to be paid to the Checks of two, the third having absconded. *Ex parte Hunter and Hebden.* 363
9. To make Assignees liable as for Money specifically received, it must have come to their Hands with a Knowledge of its Appropriation. *Kieran v. Johnson.*  
*Page 462*
10. A Bankrupt, whether certificated or not, cannot be Assignee under his own Commission. *Ex parte Jackson.* 221
11. A Landlord being Assignee, cannot resume Possession and relet but for the Benefit of the Estate. *Ex parte Wright.* 244
12. A Commission of Bankrupt vests in the Assignees under it all the personal or moveable Property of the Bankrupt, precluding Creditors in Scotland, where the Bankrupt has also resided and traded, from attaching by legal Process the personal or moveable Property of the Bankrupt in that Country, or from administering it in a Course of Distribution under a Sequestration.  

But the Commission does not affect the heritable or real Property of the Bankrupt out of England, nor is there any legal Obligation on him to convey it to his Assignees, farther than what the Creditors are indirectly enabled to enforce by the Power which they have of granting or withholding his Certificate.

The Title of the Assignees by Assignment under a Commission of Bankrupt does not, like an Assignment by an Individual, or upon particular Contract, require Intimation, the former being recognized

## TABLE OF CONTENTS.

485

nized as a Transfer of a public Nature, taking Effect by Operation of Law as a Transfer by Marriage.

To complete a Title by Assignment, it is not necessary that the Intimation should be notarial or formal. Ordinary Notice, or Circumstances of Conduct from which a Claim under the Assignment is to be inferred, considered as equivalent to solemn Intimation. *Selkrig v. Davis.* Page 291

13. Joint Creditors not allowed to vote in the Choice of Assignees under a separate Commission, although the petitioning Creditor, whose Debt would have carried the Choice, consented.

An Application that a Trustee or Inspector may be appointed, to protect the Interests of a Class of Creditors, is premature, until after the Choice of the Assignees. *Ex parte Simpson.* 337

14. Assignee in Bankruptcy charged with Interest, not as Partner in the Bank into which the Money was paid by Direction of the Creditors, but for keeping it there too long. *Ex parte Baker.* 440

15. Order for joint Creditor to vote in the Choice of Assignees under a separate Commission of Bankrupt, the petitioning Creditor, a joint Creditor whose Debt overbalanced the separate Debts, consenting. *Ex parte Taylor.* 441

16. Assignees assigning the Bankrupt's Lease are not entitled to a

Covenant of Indemnity, either for themselves or the Bankrupt, against the Covenant with the Lessor. *Wilkins v. Fry.* Page 371

17. To a Suit by Assignees the Consent of the Creditors is unnecessary, where their Interests are not affected. Nor need all the Assignees be Plaintiffs; such as refuse to join may be made Defendants. *Wilkins v. Fry.* *ibid.*

### B.

#### BAIL.

Are not "Sureties or liable" for the Debt of the Bankrupt. *Hewes v. Mott.* 454

#### BARGAIN AND SALE.

The Bargain and Sale by the Commissioners to the Assignees of a Bankrupt of the Bankrupt's freehold Land does not relate to the Act of Bankruptcy, so as to vest the Title in the Assignees from that Time, and therefore in Ejectment by the Assignees upon a Demise laid after the Act of Bankruptcy, but before the Bargain and Sale, adjudged ill. *Doe on the Demise of Esdaile v. Mitchell.* 265

K K 2      **BILLS**

## BILLS OF LADING.

A Merchant pledges for Value the Bills of Lading of an expected Cargo, his Property, in the Profits of which his Agents abroad were interested in a certain Proportion. His Agents, without the Knowledge of the Owner or the Pawnees, disposed of Part of the Cargo abroad, after which the Owner became a Bankrupt, he induces the Agent to replace the Goods disposed of by others, of which the Agents give him Bills of Lading, and he sends them to the Pawnees to make good their Security. Held that the Assignees of the Bankrupt might recover the substituted Goods against the Pawnees.

A Bill of Lading is not a necessary Instrument of the Transfer of Property in Goods consigned to the Owner. *Meyer v. Sharpe.*

*Page 124*

## BILLS OF EXCHANGE.

*See* PROOF. PARTNERSHIP. JURISDICTION.

1. Distinction as to the Necessity of Notice to the Drawer of a dishonoured Bill, depending on the Fact whether the Acceptor has Effects; or whether it is of a single Transaction; or if various Dealings, the Excess for the Accommodation of

the Drawer or Acceptor. In the latter Case, Notice equally necessary without Effects, whether Securities, as Title Deeds and short Bills, are not Effects for this Purpose?—*Quære.* *Ex parte Heath.*

*Page 141*

2. A Person is liable as Acceptor of a Bill of Exchange which was drawn while he was an Infant, but was accepted by him after he came of Age. *Stevens v. Jackson.* 284

## C.

## CERTIFICATE.

*See* ACTION. BILLS OF EXCHANGE. COMMISSION. PRACTICE. SUPERSEDEAS.

1. That there is a Petition pending to supersede the Commission is no Objection to the Allowance of the Certificate, which, while the Commission stands, the Bankrupt is entitled to, unless there be Objections exclusively attaching upon it. *Ex parte Bonsor.* 60
2. The Lord Chancellor expressed his Determination, and desired it to be understood, that he never would allow a Certificate, where it appeared that the Bankrupt had knowingly suffered fictitious Debts

to

- to be proved against his Estate.  
Ex parte Shirley. *Page* 71
3. Bankruptcy and Certificate is not a Ground of Discharge of a Prisoner in Custody under a Capias utlagatum in mesne Process. *Beauchamp v. Tomkins.* 107
4. A Deed of Composition embracing all the Creditors, although some did not come in under it, will confine the Operation of the Certificate under a subsequent Bankruptcy to the Protection of the Bankrupt's Person only, and not of his future Effects. *Slaughter v. Cheyne and Bryant.* 110
5. The Bankruptcy and Certificate of one of several joint Grantors of and Covenanters for Payment of an Annuity discharges the Bankrupt, but not the other Parties. *Baxter v. Nichols.* 111
6. Bankrupt not served with a Petition to stay his Certificate, in which an Attendance had been ordered, entitled to his Certificate, and not bound by taking Copies of the Affidavits. *Ex parte Kendall.* 115
7. In an Action against a Bankrupt who has obtained his Certificate under a second Commission, the Certificate is no Bar, unless it appears affirmatively that his Estate has produced 15s. in the Pound: Evidence that it will probably produce so much is not sufficient. *Coverly v. Morley.* 119
8. A Debt due on a Judgment signed in an Action for Damages after an Act of Bankruptcy committed by the Defendant, and a Commission issued thereon, is not discharged by the Certificate, though the Verdict was obtained before the Bankruptcy. *Buss v. Gilbert.* *Page* 157
9. Time limited for receiving Petition against Certificate not extended. *Ex parte Emmett.* 452
10. Certificate recalled. *Ex parte Cawthorne.* 186
11. Petition to stay Certificate must be served before Petition Day. *Ex parte Colbourne.* 187
12. An Order of the Court of Chancery for the Payment of a Sum of Money may be proved under the Commission, and will be barred by the Certificate. *Wall v. Atkinson.* 196
13. One Trustee cannot sign the Certificate for himself and his Co-Trustee. *Ex parte Rigby.* 224
14. A Certificate allowed against the Objection of Creditors in Scotland, that the Bankrupt was properly the Object of a Sequestration, and that the Question of Sequestration was then depending in the Court of Session. *Ex parte Cockayne.* 233
15. Debts of the Wife dum sola are discharged by the Certificate of the Husband. 250 N.
16. If a Plaintiff, after a Verdict found for the Defendant, but before Judgment signed, become Bankrupt, the Costs are not a Debt

Debt proveable under the Commission, and Execution for them may issue against him notwithstanding his Certificate. *Walker v. Barnes.* Page 279

17. A Commission under which the Bankrupt has obtained his Certificate not superseded on an Objection to the Trading; or that Debtors to the Estate, upon that Ground, refuse to pay the Assignees.

*Quære* if the Application for that Purpose were made by all the Creditors under the Commission. *Ex parte Crowder.* 324

18. Where Plaintiff sued Defendant for a Debt before Bankruptcy of Defendant, and went on with the Suit after his Bankruptcy, and had Judgment, and Defendant obtained his Certificate, and afterwards brought a Writ of Error, which was nonprossed, and Costs of Nonpross in Error awarded against him. Held that the Defendant was discharged by his Certificate from these Costs. *Scott v. Ambrose.* 434

19. Certificate stayed, that Creditors abroad, whose Debts would turn it, might have an Opportunity of assenting or dissenting.

A Creditor having the Bankrupt in Custody, and petitioning for Liberty to prove and stay the Certificate, must discharge the Bankrupt—*Quære*, Whether his presenting the Petition for that Pur-

pose is not a Resort to the Commission within the Intent of 49 Geo. 3. c. 121. s. 14. *Ex parte Lord.*—In the Matter of Steven. Page 421

20. Certificate good Defence to an Action on a Guarantee. *Gaskett v. Lindsay.* 469

### COGNOVIT.

*See* CERTIFICATE.

### COMMISSION.

*See* SUPERSEDEAS.

1. The Existence of a prior separate Commission invalidates a subsequent joint one. *Ex parte Pachelor.* 26
2. Commission of Bankruptcy cannot proceed after the Death of the Party against whom it issued without a Declaration of Bankruptcy. *Ex parte Beal.* 140

### COMMISSIONER.

A Creditor ought not to act as a Commissioner. 370

### CONTINGENCY.

Contingent Interest assigned to secure in Part a Debt exceeding the Value of the Interest, the Assignee insures against the Contingency, and upon its taking Effect receives the Sum insured. Held upon the Bankruptcy of his Debtor that

that the Sum so recovered must be deducted from his Proof. *Ex parte Andrews*.—In the Matter of *Emmett*. Page 410

### COMMITMENT (*Cases of*).

1. *Ex parte Cassidy*. 217
2. Order on Application of a Bankrupt committed to bring him again before the Commissioners; if no Effects, the Fees to be paid out of future Effects, if any. If recommitment, he would find it difficult to obtain another Order. *Ex parte Cohen*. 442
3. Where a Bankrupt committed by Commissioners is again brought before them and is remanded, there ought to be a Warrant of Recommitment or Detainer, stating the Cause of Recommitment. *Coombe's Case*. 396  
*Brown's Case*. 400

### DEED OF COMPOSITION.

- A Deed of Composition embracing all the Creditors, although some did not come in under it, will confine the Operation of the Certificate under a subsequent Bankruptcy to the Protection of the Bankrupt's Person only, and not of his future Effects. *Slaughter v. Cheyne and Bryant*. 110

### COSTS.

1. Where a separate Commission is

superseded to give Effect to a joint Commission, the petitioning Creditor is to be reimbursed his Costs out of the joint Estate. *Ex parte Pachelor*. Page 26

2. A Witness summoned by Commissioners is to have his reasonable Costs, to be settled by the Commissioners. *Ex parte Roscoe*. 345
3. Attorney ordered to pay the Costs of an improper Petition. *Ex parte Cuthbert*. 451
4. A Solicitor has a Lien upon Costs ordered to be paid to his Client upon a Petition in Bankruptcy, although there be no Fund in Court, nor can the Client release the Benefit of the Order to the Prejudice of the Solicitor. *Ex parte Bryant*. 237
5. If a Plaintiff, after a Verdict found for the Defendant, but before Judgment signed, become bankrupt, the Costs are not a Debt proveable under the Commission, and Execution for them may issue against him, notwithstanding his Certificate. *Walker v. Barnes*. 279

### COVENANT.

Assignees assigning the Bankrupt's Lease are not entitled to a Covenant of Indemnity, either for themselves or the Bankrupt, against the Covenants with the Lessor. *Wilkins v. Fry*.

### CREDI-

**CREDITORS.***See ASSIGNEE. PROOF.*

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**D.****DEED.***See ACT OF BANKRUPTCY.***DEPOSIT.***See LIEN.***DEPOSITIONS.***See PROCEEDINGS.***DIVIDEND.**

1. Ordered to be refunded. *Ex parte* Burn. Page 55
2. Dividend upon a Debt, upon which previously to the Bankruptcy the Statute of Limitations had attached, ordered to be expunged. *Ex parte* Roffey. 245
3. A Banker became bankrupt, having in his Hands Money of a bankrupt Estate under which he was a Creditor. Held that he was not entitled to receive a Dividend on his Debt till the bankrupt Estate had been reimbursed the Loss occasioned by his Insolvency. *E parte* Graham. 74

**DOCKET.***Practice on striking new Docket. In the Matter of Rutledge. Page 369*

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**E.****ELECTION.***See ACTION. ASSIGNEE.*

A joint Creditor sues out two separate Commissions: under one, he proves against the joint Estate, and receives a Dividend. Held that he had not concluded himself to prove as a joint Creditor, but that refunding the Dividend with Interest, he might prove as a separate Creditor. *Ex parte* Bolton.

369**EQUITABLE MORTGAGE AND ASSIGNMENT.***See LIEN.*

1. Equitable Mortgage for Deposit of Deeds extended beyond the original Purpose to Advances after an Alteration of the Firm by Implication or Parol. *Ex parte* Kensington. 138
2. Equitable Mortgagees under a Deposit of Title Deeds cannot effect a valid Assignment of the Premises comprised therein, in the Event of the Person pledging becoming

- coming bankrupt, unless the Assignees of the Bankrupt join in the Conveyance, although a Power of Sale be given by the Agreement entered into at the Time of the Deposit, on Notice to repay the Money intended to be secured. No such Notice had been given. *Hawkins v. Ramsbottom.* Page 151
3. A Mortgage Deed cannot be extended by Parol. The Doctrine of equitable Mortgagee productive of Inconvenience, and not to be carried by Parol. *Ex parte Hooper.* 328
4. No Authority in Bankruptcy, on Petition of equitable Mortgagee, by Deposit of Deeds, to order Sale of the Estate, where there is a subsequent Mortgagee of the Equity of Redemption, who objects, and has not proved under the Commission, the proper Remedy being by Bill. *Ex parte Topham.* 445
5. A Draft on the Executor of a Creditor, which the Executor promised to discharge on his receiving Assets, is an equitable Assignment of the Debt, available against Assignees in Bankruptcy. *Ex parte Alderson.* 446
6. The Court will decide the Validity of an equitable Mortgage without Reference to the Commissioners; but when it is established, a Reference is made to them to take the Account. *Ex parte Jennings.* 453

EVIDENCE.

1. A Creditor of the Bankrupt is not a competent Witness to sustain a Commission upon an Issue directed to try his Validity. *Ex parte Malkin.* Page 27
2. The Examination of a Bankrupt, taken not in his own Bankruptcy, but under another Commission, is not, upon the Death of the Bankrupt, Evidence upon a Petition in his Bankruptcy, to expunge the Debt of a Creditor; but it may be used by the Commissioners as a Clue to direct them in the Investigation of the Subject upon which it has proceeded. *Ex parte Campbell.* 51
3. A Witness summoned by Commissioners is bound to attend, although his Expences may not have been tendered to him, although, if he in Fact be prevented by Want of Means, it would be an Answer to an Application for an Attachment. *Ex parte Benson.* 75
4. Witness to an Act of Bankruptcy ordered to attend Commissioners, and prove, under Penalty of Costs for Disobedience. *Ex parte Gardner.* 107
5. The Guarantee of a Bill discharged by Bankruptcy of his Liability on the Bill is not an incompetent Witness in an Action on the Bill by Reason of his Liability to Costs in an Action on the Bill. *Brind v. Bacon.* 130
6. To



6. To prove the Allowance of a Bankrupt's Certificate by the Lord Chancellor, the Book kept in the Office by the Secretary of Bankrupts, in which Entries are made of the Allowance of Certificate, is not secondary Evidence.

To prove that the Defendant, who pleads his Bankruptcy, had been before discharged as a Bankrupt, after Notice to produce the former Certificate, it is enough if Witnesses state they were employed by him to solicit that Certificate, and that looking at the Entries in their Books they have no Doubt it was allowed by the Lord Chancellor. *Henry v. Leigh*.

Page 144

7. The Undertaking of the Plaintiff upon the usual Rule for bringing back the Venue to Middlesex, is satisfied by the Production of the Commission of Bankruptcy, tested at Westminster. *Kensington v. Chantler*. 155

8. To prove a petitioning Creditor's Debt, an Account signed by the Bankrupt, charging himself with a Balance brought over on a Day before the Bankruptcy, is not admissible Evidence without Proof that the Bankrupt allowed the Account before the Bankruptcy. *Hoare v. Coryton*. 158

9. In an Action by a Bankrupt against the petitioning Creditor, to try the Validity of the Commission, Proof that the Bankrupt

and petitioning Creditor attended the second Meeting of the Commissioners, and discussed before them the Debt due to the petitioning Creditor, and produced their Accounts, and the Bankrupt objected to part of the petitioning Creditor's Account, and the Commissioners ticked off such Items in it as they allowed, and struck a Balance of 169*l.*, was held to be Evidence, to be left to the Jury, of an implied Admission by the Bankrupt, from his Conduct and Demeanor before the Commissioners, that such a Balance was due, but not of an Adjudication by them by their own Authority, or of an Award made by them, with the Consent of the Parties; and therefore where it had been so left to the Jury the Court granted a new Trial. *Jarrett v. Leonard*.

Page 262

10. Where one of three Partners in a banking Concern, who resided at the Place where the Banking-house was, and was the only Partner who transacted the Business, the other two residing at a Distance from it, absented himself from the Banking-house, shut it up, and stopped Payment: held that this was not Evidence of a joint Act of Bankruptcy by all three.

The Defendant, though he has given no Notice that he intends to dispute the Proceedings under the Commission, may nevertheless give

give Evidence to disprove the Act of Bankruptcy. *Mills v. Bennett.*

*Page 269*

11. A Creditor who has assigned his Debt is a competent Witness to increase the Fund out of which the Debt is to be paid.

An equitable Assignment of a Debt may be by Parol as well as by Deed. *Heath v. Hall.* 271

12. In proving the Title of Assignees of a Bankrupt, if the petitioning Creditor was the Assignee of another Bankrupt, it is necessary to prove the Title of the petitioning Creditor to be such Assignee, by all the like Proof by which the Title of the Assignee in Question is to be proved. *Doe, on the Demise of Dawson, v. Liston.* 276

13. If the Assignees of a bankrupt Manufacturer employ him in carrying on the Manufacture for the Benefit of the Estate, and pay him Money from Time to Time, this is Evidence of such a Contract between him and his Assignees as will enable him to recover from them a reasonable Compensation for Work and Labour. *Coles v. Barrow.* 277

14. Although a Person has been improperly examined before Commissioners of Bankrupt, upon a Subject unconnected with the Interest of the Bankrupt's Estate, with a View to procure Evidence in an Action depending against him, the Examination may be used as Evidence by the Plaintiff at the

Trial of the Action, and the Judge at Nisi Prius cannot inquire into the Abuse of the Authority of the Great Seal, by which the Examination was obtained.

The Remedy of a Party so improperly examined is by an Application to the Lord Chancellor, to have the Examination taken off the File and cancelled. *Stockfleth v. De Tastet* *Page 282*

15. In an Action against the Sheriff for a false Return to a Writ of Fi. Fa. where the Defence rests upon the Validity of a Commission of Bankruptcy, if it appears that the Assignees are the real Parties, a Declaration by one of them, who was the petitioning Creditor, made subsequently to the suing out of the Commission, that the Bankrupt did not owe him £100, is admissible Evidence on the Part of the Plaintiff. *Dowden v. Fowle.* 283
16. In an Action by Bankrupt against his Assignees to try the Validity of the Commission, where Notice being given only to dispute the Act of Bankruptcy, the Defendant read the two Depositions on the File of the Proceedings, which prove the Trading and petitioning Creditor's Debt, the Residue of the Proceedings are not to be considered in Evidence, and the Plaintiff's Counsel has no Right to inspect them. *Bluck v. Thorne.*

285

17. Persons ordered to attend Commissioners to prove Act of Bankruptcy,

ruptcy, having refused Obedience to the Warrant of the Commissioners, upon the Ground that they were Creditors, and therefore incompetent as Witnesses.

That a Party is a Creditor is not a preliminary Objection to his being examined: as the Result of the Examination may establish that he is not a Creditor. *Ex parte* ——. In the Matter of Gooldie. *Page* 330

18. A Party attending Commissioners for the Purpose of being examined as to the Property of the Bankrupt, is not entitled to have his Expences paid or ascertained till his Examination is concluded. *Ex parte* Roscoe. 345

19. One who is subpoenaed as a Witness, and attends at the Trial, but there refuses to give his Evidence, unless his Expences are paid, and is thereupon not examined, may maintain Assumpsit for his necessary Expences of Attendance against the Party who subpoenaed him. *Hallet v. Mears.* 346. N.

20. The Commission and Proceedings are inadmissible Evidence of an Act of Bankruptcy for the Purpose of defeating a Conveyance. *Whitworth v. Graham.* 364

21. A petitioning Creditor is a competent Witness to defeat a Commission, and even to cut down the petitioning Creditor's Debt. *Lloyd v. Stretton.* 460

22. Debt on Bond by Assignees. Plea Payment. Assignees need not

prove themselves to be so. *Crosbie v. Oliver.* *Page* 460

23. Whether in an Action by Assignees the petitioning Creditor is compellable to produce the Bill of Exchange on which the Commission issued. *Quere.*

But if called for that Purpose, he cannot be cross-examined by the Defendants. *Reed v. James.* 463

24. A Bankrupt is competent to prove that a Creditor, Defendant in an Action by his Assignees, knew of his Insolvency. *Ibid.* 464

25. The Proceedings are not conclusive Evidence of the Bankruptcy, although Notice has not been given to dispute it. *Brown v. Forrestall.* 469

26. A Date upon a promissory Note is prima facie Evidence to shew it existed before the Bankruptcy; but to this a Declaration of the Bankrupt, subsequent to his Bankruptcy, is inadmissible. *Taylor v. Kinloch.* 474

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## F.

### FEEs.

The Solicitor answerable to the Commissioners for their Fees. *Ex parte* Griffiths. 343

### FREIGHT.

Where a Ship sailed with Ballast from London

London to Jamaica, and was sold on her Voyage there, and afterwards sailed from Jamaica to London with Goods shipped on a Contract with the Owners of the Ship; at the Time of the Shipping, the Creditors of the quondam Owners have no Lien on the Freight due in respect of the Voyage from Jamaica. *Ex parte Hill.* Page 14

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## G.

### GUARANTEE.

*See* CERTIFICATE.

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## I.

### ILLEGAL DEBT.

*See* PROOF.

A Person may, before the Event happens, declare his Dissent from an illegal Bet, and recover back his Premiums. *Busk v. Walsh.* 114

### INSPECTOR.

*See* ASSIGNEE.

### INTEREST.

1. Interest out of a Surplus in Bankruptcy given to Judgment Creditor from the Date of the Commission to the Time when the principal Sums were paid, notwithstanding the Securities were

at the Time delivered up to the Assignees with Receipts in full indorsed on them; the Creditors apprehending the Estates would not produce a Surplus, which proved to be a Mistake. *Ex parte Deey.*

Page 148

2. Assignee in Bankruptcy charged with Interest not as Partner in the Bank into which the Money was paid by Direction of the Creditors, but for keeping it there too long. *Ex parte Baker.* 7

### JOINT AND SEPARATE ESTATES.

*See* PROOF.

### ISSUE.

The Party who has to sustain the Affirmative is to be Plaintiff in an Issue; and as such has the Choice of the Court where it is to be tried. *Ex parte Malkin.*—In the Matter of Adams. 27

### INSOLVENCY.

A Creditor of a Bankrupt who had sued out a Writ against him, and without proceeding upon it, afterwards received from him a Bill of Exchange in part Payment of his Debt, after being apprized that there had been a Meeting of his Creditors, and that the Bankrupt's Affairs at that Time were only capable of paying the Demands of his Creditors by Instalments, although he was assured by the Bankrupt's Agent that they

they would come round, was liable to refund of such Bills to the Assignees of the Bankrupt, as a Payment not in the usual Course of his Trade, and before Notice of Insolvency. *Bayley v. Schofield.*

Page 100

## J.

### JURISDICTION.

*See MESSENGER 3.*

### LANDLORD AND TENANT.

*See COMMISSION. ASSIGNEE.*

How far a Landlord issuing a Commission may affect his Interest in Competition with the Creditors.—*Quære.* Ex parte Gallimore, in the Matter of Gallimore. 424

### LEASE.

1. Assignees assigning the Bankrupt's Lease are not entitled to a Covenant of Indemnity either for themselves or the Bankrupt against the Covenant with the Lessor. *Wilkins v. Fry.* 371
2. Assignees ordered to deliver up Possession and execute an Assignment of the Bankrupt's Benefit in a Lease, where the Lease itself

had been deposited in the Hands of a third Person as a Security. Ex parte Clunes. Page 451

3. Assignees may sell and assign their Bankrupt's Lease without Consent of Lessor, although the Bankrupt may have covenanted not to do so. *Doe v. Bevan.* 455

### LIEN.

1. Vendor held not to have waived his Lien on the Estate sold by taking the Promissory Note of the Vendee, and receiving its Amount by Discount. Ex parte Loaring. 79

Ex parte Peake, in the Matter of Lightoller. 454

2. Vendor's Lien not discharged by taking Bills of Exchange drawn by him on, and accepted by, the Partnership of which the Vendee was a Member.

The Effect of a Security of a third Person has never been determined.

Bills of Exchange are not a Security, but a Mode of Payment. *Grant v. Mills.* 81. N.

3. Purchase Money is a Lien on Lands. It lies on the Purchaser to show that the Vendor agreed to rest on the collateral Security. *Hughes v. Kearney.* 81. N.
4. It has now been so frequently ruled that there can be no Lien on the Commission and Proceedings, that they are always ordered to be delivered up with Costs. Ex parte Titley. 83. N.
5. A joint

5. A joint Commission against A. and B., A. being dormant Partner, the joint Creditors resorted to the separate Estate of B., thereby diminishing that separate Estate, and exonerating the joint Estate of A. and B., so as to produce a Surplus of it. Held, that the separate Creditors of B. had a Lien upon that Surplus to the Extent which their Funds had been diminished by the Resort of the joint Creditors. *Ex parte Reid.* Page 84
6. A Ship, while the Possession of it is retained, is specifically chargeable in Respect of the Expence incurred in repairing it, but the Possession parted with, the Lien is lost. *Ex parte Bland.* 91
7. If a Person entrusted with Value trust his Creditors with that which may become productive of Value the first becoming bankrupt, the second may retain his Debt out of the Proceeds of the Thing entrusted to him, and only pay the Balance. *Olive v. Smith.* 122
8. Where a Ship sailed with Ballast from London to Jamaica, and was sold on her Voyage there, and afterwards sailed from Jamaica to London with Goods shipped on a Contract with the Owners of the Ship, at the Time of the Shipping, the Creditors of quondam Owners have no Lien on the Freight due in respect of the Voyage from Jamaica. *Ex parte Hill.* 14
9. A Holder of a Bill of Exchange has no Lien on Property deposited by the Drawer with the Acceptor to cover the Liability of the latter in Respect of his Acceptance; but on the Bankruptcy of Drawer and Acceptor, the Arrangement of the Property between the two Estates may render such an Equity available. *Ex parte Waring.* Page 182
10. Judgment Creditors have no Lien on Lands articed to be sold before Bankruptcy, the Conveyance to which remains unexecuted at the Bankruptcy. *Sharpe v. Roahde.* 192
11. If in a foreign Port a Loan is necessary to enable the Master of a Ship to prosecute his Voyage, a Person making that Advance is entitled to a Lien on the Ship without an Instrument of Hypothecation. *Ex parte Halkett.* 194
12. A Solicitor has a Lien upon Costs ordered to be paid to his Client upon a Petition in Bankruptcy, although there be no Fund in Court; nor can the Client release the Benefit of the Order to the Prejudice of the Solicitor. *Ex parte Bryant.* 237
13. A Lien is a Right to possess or to retain. A. consigns a Cargo to B., with a Direction to pay to C. out of the Proceeds a Sum of Money. C. has no Lien on the Proceeds. *Ex parte Heywood.* 355
14. Assignees ordered to apply the Proceeds of one Bill of Exchange in Satisfaction of another, upon Circum-

- Circumstances of specific Appropriation or Substitution. *Ex parte Peyron.* Page 366
15. A., while solvent, directs B. to remit certain Proceeds to C., and afterwards, and before the Order is executed, commits an Act of Bankruptcy. C. has a Lien on the Sum received for his Balance. Assignees of *Jamieson v. Hodson.* 467
16. The Deposit of Documents relating to a Vessel at Sea will not confer an equitable Lien. *Taylor v. Kinloch.* 474

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## M.

### MESSENGER.

The Solicitor, under a Commission of Bankruptcy, is not liable, in the first Instance, to the Messenger, whom he nominates, for his Bill of Fees: but if the Solicitor agree with the petitioning Creditor to work a Commission for a Sum certain, and receive a great Part of that Sum, he will be liable to such Messenger. *Hartop v. Jukes.*

263

### MONEY HAD AND RECEIVED.

Where R. a Tradesman, being arrested at the Suit of the Defendant upon a *Ca. sa.* placed Goods in the Hands of the Sheriff's Officer to raise Money upon them, who accord-

ingly pledged them, and five Weeks afterwards paid over the Amount to the Defendant. Held, that the Assignees of R. who had committed an Act of Bankruptcy before the Arrest, might recover the Money paid to the Defendant in an Action for Money had and received, although the Defendant was not privy to the taking of the Goods by the Sheriff's Officer, and although the Money paid to the Officer was not the identical Money raised by the Pledge. *Allanson v. Atkinson.* Page 134

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## O.

### ORDER AND DISPOSITION.

- Where, by Agreement between B. and the Defendant, B. agreed on Payment to him of a Sum certain to convey to the Defendant a Dwelling-house, and to deliver Possession of all the Household Furniture and Stock, and that after formal Possession delivered to the Defendant, B. should be allowed to remain in Possession for three Months without paying Rent; which Agreement was notorious in the Neighbourhood, and the Money was paid by the Defendant, and a formal Delivery made to him, and B. afterwards left in Possession according to the Agreement, who became

became bankrupt whilst he so remained in Possession, and before the Expiration of the three Months. Held, that this was not a Possession by the Bankrupt within the Statute, 31 Jac. 1. c. 19. s. 11. *Muller v. Moss.* Page 99

2. A Custom, that Purchasers of Hops shall leave them upon Rent in the Hop Merchant's Warehouse for Re-sale, undistinguished from his Stock, will not prevent them becoming the Property of the Hop Merchant's Assignees upon his Bankruptcy, as being in his Possession, Order, and Disposal. The Custom not being clear, distinct, and precise enough to enable others to know that the Hops so left were not the Property of the Possessor. *Thackthwaite v. Cock.* 105

3. Stock in the Public Funds in the Names of a Bankrupt and others on Trust, the Bankrupt being one of the cestui que Trust, his equitable Interest not within the Statute 21 J. 1. c. 19. s. 11. and therefore not being capable of actual Transfer, passed by Assignment. *Ex parte Kensington.* 138

The Share of a secret Partner in the joint Stock in Trade being in the Possession of an apparent Partner, and the sole ostensible Trader, is not liable to the Bankruptcy of the latter, as being within the Meaning or Mischief of the 21 J. 1. c. 19. the Bankrupt having such an Interest and qualified Property in the secret Partner's Share as to

VOL. II.

destroy the essential Requisites of a true and independent Ownership on the one Hand, and of a fraudulent and reputed Ownership on the other. *Coldwell v. Gregory.* Page 140

5. When a Testator directed that, in Case his Son should carry on the Testator's Trade for the Benefit of himself and his Mother, his Lease and Furniture should not be sold, but that the Trustees should permit the Widow and Children to reside therein, and have the Use of it. And the Widow and Son carried on the Trade and became bankrupt. Held, that the Furniture, &c. was not in the Order and Disposition of the Bankrupts. *Ex parte Martin.* 331

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## P.

### PARTNERSHIP.

*See COMMISSION. CERTIFICATE. DIVIDEND. PROOF. LIEN.*

1. A Partner continuing the Business took an Assignment of all the Stock, &c. and covenanted to indemnify the retiring Partner from the Debt then owing from the Partnership. The continuing Partner became bankrupt and obtained his Certificate, and subsequently an Action was commenced against the

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- the retiring Partner, upon an Acceptance of the Partnership. Judgment was obtained against him, and he paid the Debt and Costs. Held, that no Action would lie against the Bankrupt upon the Covenant, since under 49 Geo. 3. c. 121. s. 8. the retiring Partner might, on his Liability, have resorted to and proved his Debt under the Commission. *Wood v. Dodgson.* Page 47
2. An Agent who is paid by a Proportion of the Profits of the Adventure, is not therefore a Partner in the Goods. *Meyer v. Sharpe.* 124
3. Although the Property of a Partnership be in one or more Members of it, with an Interest in the Profits merely in the others, yet, in Bankruptcy, the Property is administered as to the joint Creditors, as belonging to them all. *Ex parte Hunter.* 382
4. Upon a Dissolution of Partnership between A. and B. it is agreed that until A. be provided for, B. shall allow him a Third of the Profits. B. afterwards forms a Partnership with C., and carries into it the Stock of A. and B. A Commission issues against A. and B. Held, that after the Satisfaction of the Creditors of B. and C., the joint Effects of B. and C. were the separate Property of B., and not the joint Property of A. and B. *Ex parte Barrow.* 252
5. Under that Agreement A. is a Partner with B. as to a Third of his Interest, but is not a Partner with B. and C. *Ex parte Barrow.* Page 252
6. Whether Property left by a dormant Partner in the Possession of the ostensible Co-partner is within the Statute of James, *Quære.* *ibid.*  
*Ex parte Dyster.* S. P. 256
7. Partnership by a Public Declaration in an Advertisement of Dissolution. *Ex parte Matthews.* 260
8. Partnership by Agreement for a Participation in Profits, or their Application. *Ex parte Langdale.* 443
9. Partnership without Participation of Profit by lending his Name, though contracting that he shall suffer no Loss. *ibid.*
10. A Partner may agree with retiring Partner to give him a Sum for the Concern, although they know the Partnership was insolvent. *Ex parte Peake.—In the Matter of Lightoller.* 454
- PAYMENT IN COURSE OF TRADE.
- Statute 19 Geo. 2. c. 32. only protects Payments in respect of Bills of Exchange after a secret Act of Bankruptcy, where the Bankrupt was liable on the Bills to the Party receiving the Money. *Holroyd v. Whitehead.* 145
- PERJURY.
- False Swearing, not strictly amounting

ing to Perjury, is an indictable Offence as a Misdemeanor. Ex parte Overton. Page 257

### PETITIONING CREDITOR.

See EVIDENCE. COSTS.

1. It is no Objection to the Commission that the petitioning Creditor had, upon striking the Docket, made an Affidavit of his Debt as for Goods sold and delivered, although he had at the Time obtained Judgment in Action brought to recover the Amount of the Goods. *Bryant v. Withers.* 8
2. Or that prior to presenting the Petition for a Commission he had not relinquished the Judgment. *Bryant v. Withers.* *ibid.*
3. To sustain a Commission upon a Debt due to the Wife, *dum sola*, she must be petitioning Creditor jointly with her Husband. *Rumsey v. George.* 108
4. If two Persons exchange Acceptances, and before the Bills are mature, one of them commits an Act of Bankruptcy, there is not such a Debt due from him to the other as will sustain a Commission. *Sarratt v. Austin.* 112
5. A Creditor may legally contract to sue out a Commission of Bankruptcy against his Debtor in Consideration that a Friend of the Debtor will give the petitioning Creditor 5s. in the Pound for his Debt, and a Bill given for the agreed Sum is a valid Bill. *Fry v. Malcolm.* Page 129
6. An uncertificated Bankrupt can petition for a Commission, if his Assignees make no Claim to the Debt. Ex parte Cartwright. 230
7. A Factor who sells Goods in his own Name without a *del credere* Commission is a good petitioning Creditor against the Purchaser, although he has merely communicated the Name of a Purchaser to his Principal, but he ceases to be so when the Principal has agreed with him to consider the Purchaser as his Debtor, and has taken Steps for recovering the Debt directly from the Purchaser. *Sadler v. Leigh.* 286
8. Petitioning Creditor responsible for the Production of a Bill of Exchange, upon the direct Proof of which the petitioning Creditor's Debt has been established: petitioning Creditor bound to be assistant to the Commission in all its Stages: petitioning Creditor declaring Commission to be invalid held liable for the Costs of Enquiries occasioned by that Declaration. Ex parte Glossop. 386
9. A Debt due to Partners will support a Commission, although one of them reside in an Enemy's Country, if such Residence do not amount to an adhering to the Enemy. *Roberts v. Hardy.* 456
10. Petitioning Creditor may have been the Partner of the Bankrupt, provided the Debt does not arise

out of the Partnership Transaction.  
Windham v. Paterson. Page 465

11. Where one of a Firm undertakes to provide for a Bill drawn by them, the Firm cannot petition for a Commission against the Acceptor. Richmond v. Heapy. 474

### PLEADING.

1. Plea justifying a Trespass under a Statute passed the 2d Year of James I. held to be bad; for although the Parliament in which the Act passed was continued to the second Year of that Reign, yet the Reference to the first Day of the sitting not being expressly excluded, determines the Date of the Act. Bryant v. Withers. 8
2. On Abatement by Bankruptcy of Defendant, an Executor, after a Decree for an Account, supplemental Bill in the Nature of a Bill of Revivor necessary. Russel v. Sharpe. 115
3. Demurrer by a Bankrupt to a Bill joining him with his Assignees in Charges and Prayer for Relief (viz. the specific Performance of a Contract previous to his Bankruptcy) allowed. Distinction upon Fraud. Whether a Bankrupt can be made Party merely for Discovery, and to maintain an Injunction, *Quære*. Whitworth v. Davis. 116
4. The Assignees under a joint Commission against A. and B. in suing on a separate Contract entered into with A., may describe them-

selves generally as the Assignees of A., without noticing the Name of B. Stonehouse v. De Silva.

Page 142

5. Joint Contractors must all be sued, although one has become bankrupt, and obtained his Certificate; and if not sued, the others may plead in Abatement. Bovil v. Wood. 155
6. In Assumpsit against two, where one pleads Non-assumpsit and a Plea of Bankruptcy, and the Plaintiff enters a Nolle Prosequi as to him, as to the several Matters pleaded by him, and the other Defendant pleads Non-assumpsit; the latter is discharged by the Nolle Prosequi. Moravia v. Hunter. 264
7. After a general Plea of Bankruptcy concluding to the Country, a Replication, that the Defendant was, before the Commission, discharged as a Bankrupt, and that his Estate has not produced 15s. in the Pound, which was pleaded in Maintenance of the Action generally and with a Verification, was held ill on a special Demurrer. Wilson v. Kemp. 268
8. A Bankrupt may file a Bill for an Account and Injunction, without making his Assignees Parties to the Suit. Lowndes v. Taylor. 365
9. To a Suit by Assignees, the Consent of the Creditors is unnecessary where their Interests are not affected. Nor need all the Assignees be Plaintiffs, such as re-  
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fuse to join may be made Defendants. *Wilkins v. Fry.* Page 371

### PRACTICE.

#### See COMMISSION.

1. The general Order of 12th August, 1809, held to be complied with by the Solicitor "authenticating" the Signature of the Petitioner without "attesting" it. The Object of the Order being to secure the Responsibility of a Solicitor to the Propriety of the Application. *Ex parte Titley.* 83
2. The Notice of Intention to dispute a Bankruptcy may be served on an Assignee by Delivery to his Attorney, but not by Delivery to the Maid Servant of the Assignee at his Dwelling-house. *Howard v. Ramsbottom.* 106
3. Bankrupt not served with a Petition to stay his Certificate, on which an Attendance had been ordered, entitled to his Certificate, and not bound by taking Copies of the Affidavit. *Ex parte Kendall.* 115
4. If the Agent in Town is the Attorney on the Record, it is no Objection to an Affidavit of the Party that it is sworn before his own Attorney in the Country. Assignments in Bankruptcy ought to be admitted. *Read v. Cooper.* 127
5. Bankrupt permitted to petition against the Commission, *Forma Pauperis.* *Ex parte Northam.* 140
6. In the Case of a Bankrupt charged in Execution, the Court will enlarge the Time for his Surrender in Discharge of Bail, notwithstanding the Provision in the Statute of 49 Geo. 3. permitting a Bankrupt in Custody in Execution to be brought before the Commissioners. *Crump v. Taylor.* Page 149
7. Affidavits inadmissible, when. 161
8. Upon Petition for Payment of Dividend—Practice what. *ibid.*
9. Upon directing an Issue to try Bankruptcy—what. 162
10. Where Commissioners refused to proceed in the Bankrupt's Examination, unless he produced his Books, &c. (which were in the Office of a Master of the Court of Chancery in Ireland) or Copies of them; an Order was made, declaring that such Books or Copies must, if required, be produced at the Expense of the Estate. *Ex parte Caleb Cridland.* 164
11. In an Issue and an Action directed by the Court, the Practice varies. In the first, the Motion for a new Trial must be made to the Court directing it; in the second, to that in which it is tried. *Carstairs v. Stein.* 178
12. Court to which it is directed has Jurisdiction to put off Trial of an Issue. *Buxton v. Lawton.* 179. N.
13. Petition to stay Certificate must be served before Petition Day. *Ex parte Coulbourn.* 187
14. A Bill of Exchange, on which the Commission was sued out, ordered to be left with the Assignees, and enrolled of Record with the Commission

- mission and Proceedings. Ex parte Jackson. Page 188
15. Where, in a Country Commission, the Bankruptcy was found on the 28th Day, but no Notice given of it at the Bankrupt Office till two Days afterwards, the Commission was held to be supersedeable within the general Order of the 20th of June, 1793; although by the Course of Post, from the Place where the Commission was opened, an earlier Communication was impossible; the Practice being uniform from the first Existence of the Order to supersede on the 30th Day, upon an Application made on the 29th, unless Notice has been previously given on the 29th of the Adjudication. Ex parte Henderson. 190
16. Defendant permitted to withdraw Rejoinder, and rejoin de novo, giving Notice of his Intention to dispute the Bankruptcy, but subject to Costs. Brickwood v. Miller. 216
17. Not, however, where the Witnesses to the Validity of the Commission are dead. Brickwood v. Miller. 340
18. Affidavit must not be sworn before the Petition is answered. Ex parte Northwood. 246
19. Except in Cases of Petitions to stay Certificates. Ex parte Overton. 257
20. Where the Delay was occasioned by the Bankrupt, the Commissioners may proceed; not where it is occasioned by the petitioning Creditor. Harrison's Case. P. 261
21. A Defendant, though he has given no Notice that he intends to dispute the Proceedings under the Commission, may, nevertheless, give Evidence to disprove the Act of Bankruptcy. Mills v. Bennet. 269
22. The Court will not stay Proceedings in an Action for the Escape of a Certificated Bankrupt, taken in Execution, released by the Sheriff, upon Production of his Certificate. Sherwood v. Benson. 276
23. Where, from Hurry of Business, the Clerk at the Bankrupt Office omitted to make the Entry of an Application for a Docket, according to Directions of the general Order, previously to the Application of another Solicitor, for the same Purpose; the first Solicitor was held to be nevertheless entitled to the Commission. 323
24. After an Order in Bankruptcy for Liberty to bring an Action with a special Direction for a Production of Papers, and not to set up the Bankruptcy, a Bill of Discovery cannot be filed. Cooke v. Marsh. 440
25. Order by Lord Thurlow, that a petitioning Creditor who has neglected to prosecute a Commission of Bankruptcy shall not have another. Ex parte Masterman. 442
26. Practice of striking a Docket for the Purpose, not of a Commission 442

- sion of Bankruptcy, but of compelling a Composition, disapproved, and not aided. *Ex parte Masterman.* *Page 442*
27. Petition amended, paying the Costs of the Day. *Ex parte Peyron.* 368
28. Petition to supersede a second Commission must be served on the Assignees under the first. *Ex parte Irvine.*
29. Petition witnessed by Agent not a sufficient Compliance with the general Order, requiring the Attestation of the Attorney. *Ex parte Weston.*
30. Where the general Issue has been pleaded without Notice of Intention to dispute Bankruptcy, it will not do to deliver the general Issue again with Notice; but the Plea must be withdrawn upon Motion, and put in *de novo.* *Poole v. Lukin.* 476

## PREFERENCE.

*See also PROPERTY which does or does not pass to Assignees.*

1. A Creditor obtains a Preference in Contemplation of an intended Deed of Composition which would be fraudulent against the Creditors under that Deed. The Composition going off, the Creditor may hold his Securities against a Commission of Bankrupt subsequently issued, and not contemplated at the Time of the Preference. *Wheelwright v. Jackson.* *Page 127*
2. Where S. obtained Bills of Exchange from the Defendant upon a fraudulent Representation, that a Security given by him to Defendant (which was void) was an ample Security; and on the next Day, having resolved to stop Payment, informed the Defendant that he repented of what he had done, and had sent express to stop the Bills and would return them; and three Days afterwards committed an Act of Bankruptcy, after which he returned to the Defendant all the Bills (except one which had been discounted); and also two Bank-notes, part of the Proceeds of such Discount. And the Defendant delivered back the Security; and afterwards a Commission of Bankruptcy issued against S. the Assignee under which Commission brought Trover against the Defendant for the Bills and Bank-notes. Held that the Defendant was entitled to retain them. *Gladstone v. Hawden.* 131
3. A. purchases Goods of B. on October 8, for the Purpose of Exportation; but finding that he must stop Payment, and that he cannot apply the Goods to the Purpose for which they were bought, he returns them to B. on October 16. On the 17th he stops Payment; but expecting Remittances from Abroad, more than sufficient to pay

pay his Debts, has no Doubt but his Creditors will give him Time. They, however, refusing, he is made bankrupt on November the 2d. In an Action by the Assignees against *B.* for the Value of the Goods, held that the Jury were warranted in finding that the Delivery of the Goods to *B.* was not made in Contemplation of Bankruptcy. *Fidgeon v. Sharp. Page 153*

### PROCEEDINGS.

Depositions upon which Commissioners have founded a Report upon a Reference to them are Proceedings in the Bankruptcy, and as such to be left in the Custody of the Assignees *Ex parte Newton.*

19

### PROOF.

#### *See SECURITY.*

1. *A.* holding the Acceptance of *B.* which he had taken in Ignorance that *B.* was a Member of the Firm of *C. & Co.*, the Drawers, and of which Firm one of the Members was an Infant, proves a Debt against the joint Estates under the separate Commissions against *B.* and *C.* (the Infancy of the other Partner excluding a joint Commission), making his Proof not as against the Liability of the Parties, arising from the Contract on the Bill,

but upon his Right to include or exclude the Resort to a dormant Partner.

Held that such Mode of Proof was a conclusive Election to resort to the joint Funds alone, and discharged the separate Estate of the Acceptor from the Liability which would otherwise have arisen out of the Ignorance of the Holder that the Acceptor was a Member of the Firm of the Drawers. *Ex parte Liddel.*

*Page 34*

2. A Holder of a Bill of Exchange, drawn by a Firm, by some of the Members constituting a distinct Firm, has a Right to prove it against all the Parties, according to their Liabilities upon the Bill, provided he was ignorant of their Partnership. *Ex parte Adam.*

36

3. Proof not to be admitted where the Holder was aware of the Identity of the Parties. *Ex parte Bigg.*

37

4. The Proof of two solvent Partners admitted under the Bankruptcy of the third for a Debt, which, by an unauthorized Use of the Partnership Name, he had created against the Firm, and which, after the Bankruptcy, they were compelled to discharge. Note.—All the Debts of the Partnership had been discharged. *Ex parte Young.*

40

5. Joint Creditors are not permitted to prove against the separate Estate, where there is joint Property,

however

- however trifling in Amount. Ex parte Peake. *Page 54*
6. Where a Creditor holding Bills of Exchange proves their Amount as his Debt, with a Statement that he holds the Bills as Security, and any of the Bills are subsequently paid by the other Parties to them, the Amount so paid must be deducted from the Proof and the Dividends; or if the Dividends have been paid upon the Whole of the Proof, without such Deduction, the Assignees are not thereby concluded, for the Lord Chancellor will order them to be refunded. It makes no Difference whether the Bills have been deposited without Indorsement, or have been indorsed by the Bankrupt to the Creditor. Ex parte Burn. 55
7. Proof of a Debt barred by the Statute of Limitations ordered to be expunged. Ex parte Roffey. 59. 245
8. A Creditor who, knowing the Partnership of the Parties, takes a Bill drawn by all and indorsed by one, is not entitled to double Proof upon the Ground that, previously to taking the Bill, he required and had the Indorsement of the one, and thereby raised a Contract for double Security. Ex parte the Bank of England. 82
9. A Depositary has a Right to avail himself of his Pledge to its utmost Extent, in Point of Proof, and to his fullest and most complete Indemnity at the Time of proving. Thus a Creditor with whom a Bill of Exchange had been deposited as a Security first proves his Debt against the Estate of the Drawer, his principal Debtor; and thereby, and by other Means, reduces his Debt to 14*l*. Subsequent to that the Acceptor becomes bankrupt; under his Commission he was held entitled to prove not only the 14*l*. but all the Interest upon his Debt at the Time of making that Proof, to the complete Liquidation of the Account in which he held the Bill as a Security. Ex parte Martin. *Page 87*
10. Money advanced to S. by B. one of several Partners, out of the Partnership Funds, on Account of Payments to be made on Policies of Insurance, underwritten by S., on Account of himself and B. in Pursuance of a previous Agreement between them to become Sharers in Profit and Loss on such Policies, was held not proveable by the surviving Partners of B. On the Part of John Bell and others. 136
11. A solvent Partner is entitled to prove against the Estate of a bankrupt Copartner the Amount of the Balance due to him upon the Partnership Account, first satisfying the Partnership Debts, or indemnifying the Bankrupt's Estate against them. Ex parte Taylor, 175. Ex parte Ogilvy. 177
12. An



12. An Order of the Court of Chancery for Payment of a Sum of Money may be proved under the Commission, and will be barred by the Certificate. *Wall v. Atkinson.* Page 196
13. A Creditor by Bill or Note may prove against all the Parties to his Security; but if previously to his Proof against *A.* Dividends have been declared upon his Proof against *B.* or *C.*, &c. such Dividend must be deducted from his Proof against *A.* Nor does it vary this Rule, that the Creditor, not being then prepared to substantiate his Proof against *A.*, had been permitted to enter a Claim against his Estate, previously to the Declaration of the Dividend under the other Commission, and had also, previously to such Declaration, made an Affidavit of his Debt to be laid before *A.*'s Commissioners at their next Meeting. *Ex parte the Royal Bank of Scotland, 197.* *Ex parte Todd.* 202. N.
14. Promissory Notes payable in Cash, or Bank of England Notes, held not to be Promissory Notes within the Statutes of Anne. The Holder, therefore, who had received them from an intermediate Person, held not entitled to prove them as a Debt against the Maker. *Ex parte Imeson.* 225
15. Proof in Bankruptcy, in Respect of Trust-property of Infants, continued by the Administratrix in the Trade in which the Testator was engaged, carried on by the Bankrupts constituting a new Firm, of which the Administratrix was a Member, and the Infants may prove either against the separate Estate of the Administratrix, or the joint Estate, as may be most advantageous for them. *Ex parte Watson.* Page 259
16. A Broker of the City of London may maintain an Action on a Contract, or sustain a Proof for a Debt arising out of Transactions as a Merchant, although such Transactions are in Contravention of the Regulations under which he derives his Office, and to the Condition of the Bond which he executes, and to the Oath which he takes on his Appointment.
- Not, however, if the Debt or Contract arises out of a Transaction in which he has acted both as Broker and Principal, that being void upon Principles of Common Law. *Ex parte Dyster.* 349
17. A Father, Member of a Bank, transfers a Sum of Money to the Credit of his Son with the Partnership. For this Credit the Son is entitled to prove under a Commission against the Firm. *Ex parte Skerratt.* 384
18. A joint Creditor sues out two separate Commissions; under one he proves against the joint Estate, and receives a Dividend. Held that he

he had not concluded himself to prove a joint Creditor, but that refunding the Dividend with Interest, he might prove as a separate Creditor. *Ex parte Bolton.*

*Page 389*

19. Joint Creditors under an Order to prove against separate Estates, proving against one or more of them, exclusively of the Rest, the Estate so burthened is entitled to Reimbursement from the others. *Ex parte Willock.* 392

20. Where several Firms are engaged in a joint Adventure, the Creditors of the Adventure, in the Event of Bankruptcy, and there being no joint Property, must prove against the separate Estate of the Individual, not of the Firms. *Ex parte Wylie.* 393

21. Bond conditioned to be void upon Payment of 3000*l.* with Interest from the Death of the Obligor, and if the Obligor should perform his Covenant (for the Payment of an Annuity of 200*l.*), contained in an Indenture of Settlement.

The Annuity is in Arrear at the Bankruptcy, creating a Breach of the Condition of the Bond, to which the Certificate would be a Bar. The Obligee, therefore, held entitled to prove under the Commission of the Obligor.—*Ex parte Rowlatt, in the Matter of Rowlatt.* 416

## PROPERTY

*Which does or does not pass to the Assignee.*

*See also PREFERENCE.*

1. Bankruptcy not a Forfeiture under a Clause in a Will against Alienation. *Wilkinson v. Wilkinson.*

*Page 444*

2. Agreement to pay into a Bank of four Partners Bills of Exchange, indorsed, and to take in Return their Promissory Notes. Three of the four become bankrupt: Bills are then paid in, and their Notes taken; and then the fourth becomes bankrupt. The Assignee held not to be entitled to retain the Bills. *Ex parte M'Gae.* 376

3. Where a Draft for Money was entrusted to a Broker to buy Exchequer Bills for his Principal, and the Broker received the Money, and misapplied it by purchasing American Stock and Bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the Principal the Securities for the American Stock and the Bullion, who sold the Whole, and received the Proceeds. Held that the Principal was entitled

- titled to withhold the Proceeds from the Assignees of the Broker, who became bankrupt on the Day on which he so received and misapplied the Money. *Taylor v. Sir Thomas Plumer.* Page 456
4. A Transfer of Property on the Eve of Bankruptcy, under a Dread of Prosecution, is valid. *De Tastet v. Carroll.* 461
5. *A.* shortly before his Bankruptcy draws a Bill, and having procured it to be discounted, gives *B.*, a Creditor, an Order to receive the Amount, which he directs *C.*, who discounts the Bill, to transmit to *B.* Whilst the Money was in the Hands of the Carrier, *A.* commits an Act of Bankruptcy. *B.*, who afterwards receives the Money, is liable to *A.*'s Assignees. *Hervey v. Liddiard.* 462
3. A Creditor attending to prove his Debt is protected from Arrest. *Ex parte List.*—In the Matter of Cumming. Page 24
4. A certificated Bankrupt discharged out of Custody upon an Attachment for Disobedience of an Order for Nonpayment of Money. *Wall v. Atkinson.* 196
5. A Bankrupt is, under the Statute 5 Geo. 2. c. 30. s. 5. protected from Arrest through the whole Period of his Examination, enlarged by the Commissioners, though they had omitted to indorse the Adjournment on his Summons. *Price's Case*, 260. *Ex parte Temple*, *Ex parte List* 23, and the Cases in the Note, Vol. I. 264.
6. A Bankrupt imprisoned at the Date of his Protection is not privileged from subsequent Detainers. *Ex parte Goldie.* 343

## PROTECTION.

1. A Bankrupt is not by Virtue of the Commissioners' Protection privileged from Arrest at the Suit of the Crown, unless he be in actual Attendance before them, and the Exception seems to include a fair Allowance of Time for going and returning. *Ex parte Temple.*—In the Matter of Temple. 22
2. Bail attending to justify are protected from Arrest, on a Mesne Process. *Rimmer v. Green.* 23 N.

## PROVISIONAL ASSIGNMENT.

Expense of, allowed only where an Extent is apprehended. *Ex parte M'Williams.*—In the Matter of *Graham.* 453

## R.

## REGISTRY ACT.

*See SHIP.*

## RELATION.

# TABLE OF CONTENTS.

511

## RELATION.

*See* ACT OF BANKRUPTCY.

## S.

## SALE.

Assignees may sell by private Contract. *Ex parte* Dunman. Page 66

## SECOND COMMISSION.

1. An uncertificated Bankrupt becoming the Object of a second Commission, whether the subsequent Creditors are preferably entitled to the Property, Query. The Question to be raised by a Bill in Equity, as too important to be determined on Petition. *Ex parte* Storks. 179
2. A second Commission superseded, and a *Procedendo* issued on a former Commission which had expired, the petitioning Creditor under the first Commission having been prevented from prosecuting his Commission by the Artifices of a Person who was desirous of covering certain Transactions between himself and the Bankrupt by a Lapse of two Months. *Ex parte* Knight. 319

## SCRIVENER.

*See* TRADING.

## SECURITY.

1. The Great Seal will very cautiously relax the Practice which requires a Security to be sold before a Proof can be made, admitted by ordering it to be taken at a Valuation. An Application for that Purpose must depend upon its special Circumstances, of which the general Benefit of the Creditors and the Amount of the Applicant's Debt are very material. *Ex parte* Smith.

Page 63

2. A Security to a Firm continued after an Alteration in the Members of it, upon the Construction of a Letter raising an Agreement to that Effect. *Ex parte* Marsh.

239

3. A Bond conditioned to repay to five Persons all Sums advanced by them, or any of them, in their Capacity of Bankers, will not extend to Sums advanced after the Decease of one of the five by the four Survivors, the four then acting as Bankers. *Weston v. Barton*.

242 N.

## SET-OFF.

1. *A.*, a Merchant, employed *B.*, a Broker, to effect Policies and sell Goods, and entrusted him with the Possession of the Policies. *A.* being indebted

indebted to *B.* for Premiums of Insurance, and having obtained an Advance of Money upon a Pledge of Goods placed in *B.*'s Hands for Sale, but not on those Goods to the Exclusion of *A.*'s general Credit, became bankrupt. Afterwards a Loss happened, and *B.* received it from the Underwriters. Held that this was a mutual Credit within the Statute 30 Geo. 2. c. 5. and that *B.* might retain the Sum received for the Loss in Liquidation of his Advances, as well as of the Balance due for Premiums. *Olive v. Smith.*

Page 122

2. Three Partners, *A. B.* and *C.*, delivered Bills to *D.* for a special Purpose: *A.* and *B.* became bankrupts. In an Action by the Assignees against *D.* for the Proceeds of the Bill, held that *C.* not having been made bankrupt, this was not a Case of mutual Credit within 5 Geo. 2. c. 30. s. 18. so as to entitle the Defendant to set off the Bills against a Debt due to him from *A. B.* and *C.* *Staniforth v. Fellows.* 151

3. A Broker, who is indebted to the Assignees of a Bankrupt for Premiums due to them upon Policies subscribed by the Bankrupt before the Bankruptcy, is not entitled to set off Returns of Premiums due upon the Arrival of Ships, which have arrived since the Bankruptcy. *Goldschmid v. Lyon.* 157

4. A Debt due to the Wife dum sola

cannot be set off against a Debt due to the Husband. *Ex parte Blagden.* Page 249

5. Where a Loss attaches upon a Policy of Insurance, after a Bankruptcy of the insured, it constitutes a Cause of Action in the Assignees; not an Interest in the Bankrupt, admitting a Set-off. *ibid.*

6. To enable the Holder of a Bankrupt's Acceptances to avail himself of them in an Action by the Assignees against himself on his own Acceptance, by Way either of Set-off or mutual Credit, he must most distinctly prove either that the Obligation on himself to pay the Bill so set off subsisted before the Bankruptcy, or that there was a mutual Credit created in the Origin of the Bills. *Aughterlony v. Easterly.* 272

7. Where to an Action by Assignees for a Debt due to the Bankrupt's Estate the Defendant set off Notes in his Possession issued by the Bankrupt before the Bankruptcy, Proof that Notes to the Amount of the Set-off came into his Hands three or four Weeks before the Bankruptcy was held sufficient Evidence from which the Jury might infer that he was in Possession of them at the Time of the Bankruptcy. *More v. Wright.* 470

8. Against Premiums due to the Bankrupt a Broker cannot set off a Loss on a Policy effected by him without

# TABLE OF CONTENTS.

511

## RELATION.

*See* ACT OF BANKRUPTCY.

## S.

## SALE.

Assignees may sell by private Contract. *Ex parte* Dunman. *Page* 66

## SECOND COMMISSION.

1. An uncertificated Bankrupt becoming the Object of a second Commission, whether the subsequent Creditors are preferably entitled to the Property, Query. The Question to be raised by a Bill in Equity, as too important to be determined on Petition. *Ex parte* Storks. 179
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  2. A Security to a Firm continued after an Alteration in the Members of it, upon the Construction of a Letter raising an Agreement to that Effect. *Ex parte* Marsh. 239
  3. A Bond conditioned to repay to five Persons all Sums advanced by them, or any of them, in their Capacity of Bankers, will not extend to Sums advanced after the Decease of one of the five by the four Survivors, the four then acting as Bankers. *Weston v. Barton*. 242 N.
- ## SET-OFF.
1. *A.*, a Merchant, employed *B.*, a Broker, to effect Policies and sell Goods, and entrusted him with the Possession of the Policies. *A.* being indebted

Ship to prosecute his Voyage, a Person making that Advance is entitled to a Lien on the Ship, without an Instrument of Hypothecation. *Ex parte Halkett.*

*Page 194*

4. But Bills of Exchange drawn by the Master upon the Owner in Favour of a Person advancing Money for the Ship, and not purporting on the Face of them to be drawn for the Purposes of the Ship, are *prima facie* Evidence against an Hypothecation. *Ex parte Halkett.* 229
5. Deposit of Documents of a Vessel at Sea will not confer equitable Lien. *Taylor v. Kinloch.* 474

#### SHORT BILLS.

The Right to have them delivered up indisputable. *Ex parte the Burton Bank.* 162

#### SIR SAMUEL ROMILLY'S ACT.

1. Where separate Commissions of Bankruptcy were issued against three or four Partners, to which they conformed and passed their Examination, and an Order was made for allowing the joint Creditors to prove their Debt under the Commission of one of the three, under which Commission the Plaintiffs proved their joint Debt, and afterwards sued all the

Partners for the same Debt, and arrested one of the other two, under whose Commission they had not proved. Held that he was not entitled to be discharged out of Custody. *Young v. Hunter.*

*Page 120*

2. A Person to whom several Debts were due from a Bankrupt, arising out of separate Sales of Goods, proved some of the Debts under the Commission; another Person, who was suggested to be a Trustee for him, sued at Law upon a Note which the Bankrupt had given for another Part of the Goods. The Court refused to interfere in a summary Way to stay Proceedings on the Bail-bond in this Action. *Howell v. Gollledge.* 130
3. The Statute 46 Geo. 3. c. 135. s. 2. does not restrain a Creditor from proving under a Commission of Bankruptcy a Debt contracted before the Act of Bankruptcy in which the Commission issued, but after Notice of a prior Act of Bankruptcy. *Ex parte Bowness.* 266
4. The Statute 49 Geo. 3. c. 121. s. 14. which enacts that Creditors proceeding under the Commission shall be deemed to have made their Election not to sue, does not extend to prevent a Creditor who proves a joint Debt under a Commission against one Partner from suing the others. *Heath v. Hall.* 271
5. If the Title of Assignees of a Bankrupt's

- Bankrupt's Estate, Strangers to the Record, comes in Question incidentally, it must be proved in the same Mode as before the Statute 49 Geo. 3. c. 121., although no Notice of contesting the Bankruptcy has been given by the opposite Party. Doe on the Demise of Mawson v. Liston. Page 276
6. A. grants a Lease to B., which contains a Covenant that B., his Executors or Administrators, without mentioning "Assigns," should not underlet without the Consent of the Lessor. B. becomes bankrupt, and his Assignees assign the Premises to C.: B obtains his Certificate, and C. re-assigns the Premises to him, after which he underlets them to another Person.—Held that B. having been discharged at the Time of his Bankruptcy from all Covenants in the Lease, by Stat. 49 Geo. 3. c. 121. s. 19., the Underletting by him, which was in the Character of Assignee, was no Forfeiture of the Lease. Doe on the Demise of Cheer v. Smith. 280
7. The proving a Debt under a Commission is an Election by the Creditors within the Statute 49 Geo. 3. c. 121. s. 14. which deprives him of his Remedy by Action against the Bankrupt, in the Cases excepted in Statute 5 Geo. 2. c. 30. s. 9. Read v. Sowerby. 288
8. The Drawer of a Bill of Exchange who has paid the Amount to the Holder after a Commission of
- VOL. II.

Bankruptcy issued against the Acceptor, may sue the Acceptor before he has obtained his Certificate, and arrest him upon the Bill, notwithstanding the Holder has proved the Bill under the Commission. Mead v. Braham. Page 289

## SOLICITOR.

See PRACTICE. COSTS. LIEN.

1. The Majority of the Assignees regulates the Removal or the Continuance of the Solicitor. Ex parte Tomlinson. 66
2. The Solicitor under a Commission of Bankruptcy is not liable, in the first Instance, to the Messenger, whom he nominates, for his Bill of Fees; but if the Solicitor agrees with the petitioning Creditor to work a Commission for a Sum certain, and receive a great Part of that Sum, he will be liable to such Messenger. Hartop v. Jukes. 263
3. The Solicitor answerable to the Commissioners for their Fees. Ex parte Griffiths. 342
4. May maintain Action against Assignee for Business done under Commission, although the Bill has not been taxed under 5 Geo. 2. c. 30. s. 45. Tarn v. Heys. 475

## SUPERSEDEAS.

1. A Commission of Bankrupt sustained



tained against the three following Objections :

1st. That the petitioning Creditor had, upon striking the Docket, made an Affidavit of his Debt, as for Goods sold and delivered, although he had at the Time obtained Judgment in an Action brought to recover the Amount of the Goods.

2d. That prior to the Act of Bankruptcy upon which the Commission issued there was another Act of Bankruptcy, with a Debt sufficient to sustain a Commission, and of that the petitioning Creditor had Notice.

3d. That prior to presenting the Petition for a Commission, the petitioning Creditor had not relinquished his Judgment.

The Court being of Opinion as to the first Objection, that all the Statute 5 Geo. 2. c. 30. s. 23. required was, in Truth and Reality, a Debt of sufficient Amount ; as to the second, that it was not competent to the Bankrupt to defeat a Commission against him, by alleging the Criminality of another Act of Bankruptcy ; as to the third, the Statute 49 Geo. 3. c. 121. s. 14. only applied to Creditors who came in to prove their Debts. *Bryant v. Withers.* Page 8

2. The Lord Chancellor has no Jurisdiction to indemnify an Assignee against the Consequences of a Supersedeas. In the Matter of Bryant. 17

3. The Existence of a prior separate Commission invalidates a subsequent joint one. But for the Convenience of administering the joint Property, the Court will, by superseding the separate Commission, give Effect to the joint one, unless there be a strong Reason against the Court so interfering ; and it is not a sufficient Reason that, by such Interference, a separate Creditor, to a great Amount, will be divested of his Right of voting in the Choice of Assignees. *Ex parte Pachelor.* Page 26

4. Misnomer or Misdescription of Bankrupt. *Ex parte Smith.* 25

5. A Creditor who has proved his Debt is not precluded from applying to supersede the Commission. *Ex parte Bonsor.* 61

6. A Bankrupt who has obtained a Verdict in an Action brought by him to try the Validity of his Commission, pending a Rule Nisi for a new Trial, confessed Judgment to one of his Assignees, who was the petitioning Creditor, for a Sum of Money in Discharge of his Debt, in Consideration of his not opposing the Bankrupt's Petition for a Supersedeas. The Court set aside the Judgment on the Bankrupt's Application. *Thomas v. Rhodes.* 104

7. Separate Commissions taken out by a joint Creditor against Persons who had just ceased to be Partners, and who had very few separate Debts

- Debts superseded. *Ex parte Gardner.* Page 107
8. Commission of Bankrupt which had not been opened superseded, with the Consent of the petitioning Creditor. *Ex parte Trigwell.* 108
9. A Commission of Bankrupt cannot be superseded which has not been sealed. *Ex parte Williams.* 142
10. Superseded with Costs on a Concerted Denial. *Ex parte Binmer.* 453
11. That there is a prior separate Commission in Ireland in Prosecution against one of two Partners, is not a Ground for superseding a joint Commission against them in this Country. *Ex parte Caleb Cridland.* 164
12. A Commission sustained against the following Objections: first, a joint Bond to the Great Seal had been executed by one only of the Partners: secondly one of the Bankrupts had been the Subject of two former Commissions, and although he had obtained his Certificate, yet he had not, under the second, paid fifteen Shillings in the Pound. *Ex parte Hodgkinson.* 172  
*Roberts v. Hardie.* *ibid.* N.
13. Though the Commission be legally valid, yet if it has been taken out against good Faith, or with a View to enforce a Compliance with an Arrangement then pending between the Parties, this Court will supersede it upon the general Principle which all Courts adopt to control the Abuse of their Process. *Ex parte Harcourt.* Page 203
14. Although the Requisites to sustain the Commission appear on the Proceedings to be established, yet if the Court be satisfied on Affidavit of their Insufficiency, it will supersede the Commission without an Issue. *Ex parte Gallimore.* 234
15. A Commission against a Person by the Name of Laidlaw superseded at the Instance of a Creditor who had taken out a Commission by the right Name of Laidlaw, although the Bankrupt had used as well one Name as the other.  
*Quære* Whether the Commission would have been superseded at the Instance of the Bankrupt himself. *Ex parte Schofield.* 246
16. That a particular Trading is not specified in the Commission is not a Ground of Supersedeas, the general Description of Dealer and Chapman being sufficient. *Ex parte Herbert.* 248
17. A second Commission superseded and a Procedendo issued on a former Commission which had expired. The petitioning Creditor under the first Commission having been prevented from prosecuting his Commission by the Artifices of a Person who was desirous of covering certain Transactions between himself and the Bankrupt, by a Lapse of two Months. *Ex parte Knight.* 319
18. A Commission under which the Bankrupt has obtained his Certificate

cate not superseded on an Objection to the Trading, or that Debtors to the Estate upon that Ground refuse to pay the Assignees, *quære* if the Application for that Purpose were made by all the Creditors under the Commission. Ex parte Crowder. Page 324

19. A separate Commission not superseded to give Effect to a joint one, where the Bankrupt has committed a Felony in not surrendering to the separate Commission. Ex parte Roberts. Ex parte Wells.

378

20. Although all the Requisites of a Commission concur to its Validity, yet, if taken out for an indirect and improper Object, (as a Landlord to determine a Lease, contrary to good Faith), it will be superseded. Ex parte Gallimore. In the Matter of Gallimore. 424

### SURETY.

1. The Words "Person liable," in the Statute 49 Geo. 3. c. 121. s. 8. will comprehend all Persons rendering themselves responsible for the Debt of another: e. g. an Acceptor of a Bill for the Accommodation of the Drawer. Ex parte Young. 40
2. The Obligee of a Bond given by a Principal and Surety, conditioned for the Payment of Money by Instalments, who has proved under a Commission against the Principal the whole Debt, and re-

ceived a Dividend thereon of 2s. and 7d. in the Pound, may recover against the Surety an Instalment due, making a Deduction of 2s. and 7d. on the Amount of such Instalment, and the Surety is not entitled to have the whole Dividend applied in Discharge of that Instalment, but only rateable in part Payment of each Instalment as it becomes due. Martin v. Brecknell. Page 156  
Ex parte Brooks. 334

### SURRENDER.

Bankrupt permitted to surrender under Circumstances of innocent Omission, although the Assignees opposed. Ex parte Shiles. 381

### SUSPENDING PROCEEDINGS.

1. When the Court directs an Action to be brought to try the Bankruptcy, it suspends in the mean Time the Proceedings under the Commission; but if the Action establishes the Bankruptcy, it will not, without special Ground, allow a longer Suspension; nor is it a sufficient Ground that the Bankrupt is about to bring another Action, and therein to put his Objection to the Commission upon the Record, in order to carry it, by Writ of Error, to the House of Lords. Ex parte Bryant. 1
2. The Payment of the Creditors under

under the Commission, as it would be sufficient to induce a Superse-  
deas, is a Ground for staying the  
Proceedings; but the Funds pro-  
posed for the Purpose must be  
fully and immediately applicable.  
Ex parte Bryant. *Page 1*

3. Commission not suspended upon  
an Offer to pay into the Name of  
the Accountant General a Fund  
alleged to be sufficient for the  
Payment of the Creditors. Ex  
parte Kemp. *5. N.*
4. Although the Lord Chancellor  
will stop the Progress of a Com-  
mission against one who is not  
properly the Object of it, and al-  
though the strong Probability is  
that no Person can now be the Ob-  
ject of it as a Scrivener, yet that  
Probability is not in itself a Ground  
for such Interference. In the  
Matter of Lewis. *59*

## T.

### TITLE.

A Bankrupt Estate is sold by  
Auction; the Purchaser, after hav-  
ing paid a Deposit, gives Notice  
that he means to abandon the  
Purchase on a supposed Defect in  
the Title. The Commission is after-  
wards superseded, on the Ground  
that there was no good petitioning  
Creditor's Debt; and another Com-  
mission issues, and the same As-  
signees are chosen. Held, that as

the Assignees, at the Time when  
they received Notice from the  
Purchaser, had not a good Title  
to the Estate, they could not  
enforce the Contract, nor conse-  
quently retain the Deposit. Bart-  
lett v. Tuchin. *Page 2*

### TITLE DEEDS.

Attested Copies of, to be given  
by Assignees; but their 'Covenant  
for the Production of the Title  
Deeds to be confined to the Time  
of their Continuance as Assignees.  
Ex parte Stuart. *215*

### TRADING.

1. A Scrivener is one who with an In-  
tention thereby to get a Living re-  
ceives into his Custody other Men's  
Money, to be laid out on their Ac-  
count, according to the Purpose for  
which it is deposited. The Mode  
of his Remuneration, whether by  
Procuration-Fees, by a Charge for  
Commission, or otherwise, is a  
Circumstance immaterial. The  
actual Deposit of, and complete  
Control over the Money of others,  
till invested, and the Intention  
thereby to get a Living, being  
the Essence of this Species of  
Trading. Ex parte Malkin, in  
the Matter of Adams. *27*
2. A Farmer buying and selling  
Horses to an Extent unauthorized  
by his Character of Farmer may  
be a Bankrupt as a Horse Dealer,  
although he may have bought and  
sold without a Licence to deal in  
Horses. Ex parte Gibbs. *38*  
*Wright*

- Wright v. Bird. *Page* 39
3. Whether a Person is to be considered a Trader after he has quitted Business, depends upon his Intention as to resuming it. *Ex parte Cundy.* 357
4. A Man, whether Termor or Freeholder, who sells Bricks, made from the Produce of his Soil, is not a Trader within the Bankrupt Laws: but otherwise, if he purchase the Materials of his Manufacture. From the Peculiarity of an Agreement in this Case, an Issue directed upon this Species of Trading.
- Whether the Owner of a Colliery, borrowing a particular Species of Coal to render his own marketable, be a Trader, is a Question for a Jury upon the Intention.
- Owner of a Colliery buying Articles, and selling them to his own Pitmen, not a Trader. So as to a Fisherman, who buys occasionally Fish to make up for Market a Cargo otherwise deficient. *Ex parte Gallimore, in the Matter of Gallimore.* 424
5. Publisher of Newspaper buying the whole Impression and reselling it at a Profit, a Trader. *Gimingham v. Laing.* 472

## TRUSTEE.

An Executor and Trustee having

committed a Devastavit, precluded from proving under his Bankruptcy, and Liberty so to do given (in the first Instance, and without previous Application to the Commissioners), to a Legatee on Behalf of himself and others, with a Direction that the Dividends be paid into the Bank, in Trust, in the Matter *ex parte Moody, ex parte Preston, in the Matter of Warne.* *Page* 413

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U.

## USURY.

1. An Order for an Inquiry before Commissioners to try whether a Debt proved was usurious, merely on a Deposition of the Bankrupt as to the Usury, refused. *Ex parte Burt.* 445
2. Charge by a Bill Broker in the Country of ten Shillings per Cent. Commission, in respect of a Bill payable in London, not usurious. *Ex parte Henson, in the Matter of Watson.* 452

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W.

## WITNESS.

*See EVIDENCE.*

END OF VOL. II.











